Camilo Sanchez
University of Virginia School of Law
580 Massie Road
Charlottesville, VA 22903

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing with great enthusiasm to recommend Zachary Griffith for the position of Law Clerk. In my five years as Director of the International Human Rights Law Clinic at the University of Virginia, I have had the privilege of supervising over 100 students, and Zach stands out as being in the top 3%.

Zach is among the most committed to public service, bright, and responsible students I have encountered. He has taken two of my classes – a yearlong seminar on human rights research and the international human rights law clinic. This has allowed me to work closely with him in the classroom and on field trips to Mexico and Argentina for clinic project research.

Throughout these experiences, Zach has exhibited a responsible, committed approach, formidable time management skills, an analytical mind, and a strategic viewpoint. His maturity, a quality in part derived from his work in the Corps, helped not only in making our research successful but also influenced his peers, encouraging them to adopt professional demeanors similar to his own. Zach truly is a leader who leads by example.

Moreover, Zach's legal research skills are not only exceptional but also finely honed, demonstrating his capacity to handle intricate and multifaceted legal issues. One particularly impressive example of his research prowess was when he prepared a comprehensive and coherent legal memorandum on South African labor law, with a specific focus on the rights of agricultural workers. This was no small task, given the intricacies of South African labor law and the challenges inherent in understanding the unique struggles faced by agricultural workers. Zach's approach to this task was meticulous and thorough. He delved into various legal databases and sources, displaying a mastery of both domestic and international legal resources. His ability to extract critical information and apply the law to real-world scenarios was remarkable. The resultant memorandum was well-structured, providing a deep understanding of the subject matter, and served as an exemplar for the other teams in the clinic.

Further demonstrating his research acumen, Zach conducted a significant human rights research project focused on Germany's international obligations regarding violations committed on the African continent. This is a complex and niche area of international law, one that requires a nuanced understanding of international legal principles, human rights frameworks, and diplomatic relations. Zach rose to the challenge admirably, crafting an essay that was not only rich in detail but also cogent in its argumentation. His research unearthed powerful legal arguments and brought attention to a subject that, despite its significant legal implications, is often overlooked in global discourse.

With Zach's exceptional communication skills, outstanding time management, strong ethical commitment, keen attention to detail, brilliant analytical thinking, and strong research skills, I am confident he would be an excellent law clerk. Furthermore, Zach's straightforward, honest, and cordial demeanor makes him a pleasure to work with.

In conclusion, I wholeheartedly recommend Zach for the position of Law Clerk. He will undoubtedly prove to be a valuable asset to your chambers.

Please feel free to contact me if you need further information.

Sincerely,

Camilo Sanchez

Camilo Sanchez - csanchez@law.virginia.edu - (434) 924-7893

Zachary M. Griffith

2400 Arlington Blvd. Apt. #13, Charlottesville, VA 22903 • (402) 800–7637 • eqx7nk@virginia.edu

WRITING SAMPLE

This writing sample is a memorandum I wrote for my second-year course, "International Law/Use of Force." The assignment was to apply the *jus ad bellum* international legal framework to a present-day situation. I chose to apply the United Nations Charter, Article 51 self-defense framework to the (then) unlawful detention of Brittney Griner in Russia. This writing sample is my own work product and has not been edited by any other person.

TO: Professor Ashley Deeks
FROM: Zach Griffith
RE: International Law: Using Force in Hostage Situations – The Case of Brittney Griner
DATE: October 4, 2022

Russian authorities arrested Brittney Griner in February of 2022 on drug charges. American nationals are not immune from the laws of foreign states, and as such, it is not uncommon for American citizens to be arrested abroad when they commit crimes. However, in Griner's case, her celebrity as a professional basketball player, accompanied by the political backdrop of the Russian invasion of Ukraine, brought suspicion to the legitimacy of her detention. Over 70 days after her arrest, in May of 2022, the Department of State determined that Griner was being wrongfully detained,[1] and her case was being transferred to the Special Presidential Envoy for Hostage Affairs.[2] Griner's agent thereafter issued a statement saying, "Brittney has been detained for 75 days, and our expectation is that the White House do *whatever is necessary* to bring her home."[3] Could the United States use force to bring Griner back to the United States? This memorandum explains why the answer to that question, under international law, is "no." It begins with an argument that Article 51 of the UN Charter does permit the use of force in some hostage situations. It then transitions to the customary international law limitations on the use of force and ends by applying these rules to Griner's situation in Russia, providing realistic measures the United States can take to bring Griner home.

Article 51 of the UN Charter: Inherent Right of Self-Defense

Under Article 51, there is an "inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations."[4] However, there is ambiguity as to the meaning of what constitutes an "armed attack" and further ambiguity on the meaning of "inherent" within Article 51. Those who take on a strict-constructionist view of an "armed attack" interpret the framers' intention within the context of Article 2(4).[5] They look to ICJ language and reserve the inherent right of self-defense for situations that involve "the most grave forms of use of force."[6] Broader interpretations of Article 51 suggest that the word "inherent" encompasses the customary international law that pre-dates the drafting of the UN Charter.[7] This interpretation points to evidence prior to 1945, where the use of force was permitted to protect nationals abroad when their life was in imminent danger.[8] State practice can provide further

[1] For purposes of this article only, there will be no distinction between "wrongfully detained" and "hostage." As such, Brittney Griner is to be viewed as a hostage.

[2] Louise Radnofsky, *U.S. State Department Declares That Brittney Griner Has Been 'Wrongfully Detained' in Russia*, Wall St. J. (May 3, 2022), https://www.wsj.com/articles/brittney-griner-russia-us-state-department-11651595850?mod=Searchresults_pos1&page=1.

[3] *Id.*

[4] U.N. Charter art. 51.

[5] Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 Vill. L. Rev. 706 (2005).

[6] *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua. v. U.S.), Judgement, 1986 I.C.J. 101, ¶ 191 (June 27).

[7] Kristen E. Eichensehr, *Defending Nationals Abroad: Assessing the Lawfulness of Forcible Hostage Rescues*, 48 Va. J. Int'l L. 465 (2007-2008).

[8] *Id.*

guidance, as a history of acquiescence and sometimes outward approval, suggests that self-defense is permitted when nationals are in danger abroad.[9]

Even if state practice and a broad interpretation of Article 51 indicate that force can be used in some hostage situations, there is no bright-line rule indicating when a hostage scenario rises to the level of an "armed attack." State practice gives some guidance as to the different factors to consider when determining if hostage situations amount to an armed attack. These factors include the number of hostages, the position of the hostages (government officials, tourists, students, etc.), whether the hostage-taking violates a treaty, and why the individuals were targeted.[10] These factors help prove the magnitude of the situation, but this list is not dispositive. One scholar notes, "the magnitude requirement in the end rests, unsatisfyingly, on a case-by-case determination."[11] Furthermore, even if the magnitude rises to the level of an armed attack, customary international law provides further limitations on the use of force in self-defense. These limitations are detailed below.

International Law Limitations on the Use of Force: Necessity, Immediacy, and Proportionality

1. Necessity

Two criteria need to be met to meet the necessity requirement for using force in self-defense. First, the victim state must face an imminent threat of attack or have a justifiable belief that it will face a repetition of an attack that it just suffered.[12] In the context of a hostage situation, this would mean that there is an "imminent threat of irreparable harm to the hostage."[13] Detention alone would not breach the threshold of an armed attack. The victim state would need proof of physical harm or proof that the hostage faces imminent physical danger.[14] Second, the victim state must find that non-forcible measures have proved ineffective, or would prove ineffective, for resolving the threat of harm to the hostage.[15] These non-forcible measures include diplomatic means of resolving the conflict, imposing sanctions on the attacking state, or perhaps having a third party intervene in the negotiation process. If the victim state has determined there is an "imminent threat of irreparable harm to the hostage" and that non-forceful measures have proved, or would prove, ineffective for resolving the conflict, then the necessity requirement is likely satisfied.

2. Immediacy

The requirement of immediacy pertains to the justification as to why the victim state must use force in self-defense at that moment in time. There are two ways that the immediacy requirement can be met: (1) if the harm to the hostage is immediate, with the harm amounting to physical injury and not mere detention, or (2) if a change in the circumstances making the rescue mission

[9] *Id*. at 466.
[10] *Id*. at 469.
[11] *Id*.
[12] Ashley S. Deeks, *"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense*, 52 Va. J. Int'l L. 494 (2012).
[13] *Eichensehr* at 474.
[14] *Id*. at 471.
[15] *Id.* at 472.

difficult or impossible is about to occur.[16] This requirement is highly subjective, as states are forced to rely on their intelligence and often have to make decisions with imperfect information.

3. Proportionality

For the proportionality requirement to be met, the use of force must be the least amount necessary in securing the rescue of the hostage, and the force used must be for the sole purpose of rescuing the hostage.[17] The U.S. intervention in Grenada is an example where a state used force that went beyond the purpose of rescuing nationals. As a result, the U.S. was condemned by the international community, which saw the U.S. using the defense of nationals as a pretext for overthrowing a foreign state's government.[18] As a counter example, the Israeli rescue mission in Entebbe, Uganda, illustrates what might be seen as proportionate. There, Israeli forces landed in Entebbe and rescued hostages from a plane that Palestinian militants hijacked.[19] In the process, they destroyed a large portion of the Ugandan Air Force and killed the hostage-takers and some Ugandan soldiers.[20] The Security Council did not condemn using force in the rescue, and many countries approved of the forceful response.[21] This shows that international law is more likely to accept forceful intervention when it is limited to the sole purpose of hostage rescue.

International Law Application to Brittney Griner: United States Options

Considering Griner's wrongful detention in Russia, one can hardly argue that Russia is engaged in an "armed attack" against the United States within the scope of Article 51. Griner was in Russia for employment purposes, playing professional basketball, not as a diplomatic agent of the U.S. She is one of many nationals whom the State Department deems "wrongfully detained" around the globe. Her celebrity does add to the complexity of her detention because it puts public pressure on the U.S. to act, but that does not factor into the Article 51 analysis. Russia could be using Griner in "hostage diplomacy" to assert pressure on the U.S. in response to its support of Ukraine. Even so, her detention does not fall within the scope of an "armed attack" within the meaning of Article 51.

The customary international law factors of necessity, immediacy, and proportionality further illustrate why the United States could not legally justify using force against Russia to rescue Griner. There has been no finding of an "imminent threat of irreparable harm to the hostage." On the contrary, video footage has shown Griner in good physical condition. Furthermore, diplomatic efforts and negotiations are ongoing.[22] As long as there is communication between Russia and the United States, there remains an avenue for non-forceful resolution. These negotiations further indicate that the U.S. does not meet the immediacy requirement. Given the apparent lack of physical harm done to Griner, no conceivable use of force would be proportionate in this circumstance. Breaking into a Russian prison would likely result in

[16] *Id*. at 475.
[17] *Id*. at 476.
[18] *Eichensehr* at 477.
[19] *Id*.
[20] *Id*.
[21] *Id*.
[22] *Id*. Sources say that there are talks about the potential release of Brittney Griner and Paul Whelen, a wrongfully detained U.S. marine, in exchange for Russian arms dealer, Viktor Bout.

casualties, which Russia could interpret as an armed attack within its sovereign borders. Given the unpredictable behavior of Russia and its current war with Ukraine, the response could be devastating.

What options does this leave the United States with? Diplomatic measures are still on the table. As the U.S. is currently doing, it can continue to pursue a peaceful resolution through negotiations. This could include the possibility of a prisoner exchange. Even if negotiations fail, other non-forceful means are at the U.S. disposal. This could include having third parties facilitate the negotiations, imposing sanctions, or even seeking a Security Council Resolution.[23] The use of force is limited by customary international law for good reason. Minor conflicts between two states can quickly escalate to wars involving many states. The U.S. is correctly handling the wrongful detention of Griner in accordance with international law. Any deviation from that by using force would prove a blatant violation of international law and have dire consequences domestically in the U.S. and potentially around the globe.

[23] The Russians would certainly veto any resolution put forth; however, large support from other voting members could put external pressure on the Russians.

Applicant Details

First Name	**Helen**
Last Name	**Griffiths**
Citizenship Status	**U. S. Citizen**
Email Address	**hbg8394@nyu.edu**
Address	**Address** Street **33 Greenwich Ave, Apt 12B** City **New York City** State/Territory **New York** Zip **10014** Country **United States**
Contact Phone Number	**719-679-7084**

Applicant Education

BA/BS From	**Colorado College**
Date of BA/BS	**May 2018**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 25, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**N.Y.U. Review of Law & Social Change**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Specialized Work Experience	**Death Penalty**

Recommenders

Archer, Deborah
deborah.archer@nyu.edu
212-998-6528

Barkow, Rachel
barkowr@mercury.law.nyu.edu
212-992-8829

Friedman, Barry
barry.friedman@nyu.edu
212-998-6293

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Helen Griffiths
33 Greenwich Ave., Apt. 12B
New York, NY 10014
hbg8394@nyu.edu
719-679-7084

June 11, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker,

I am a third-year student at the New York University School of Law. I am writing to apply for a 2024-2025 term clerkship in your chambers.

My work experience reflects my passion for the law, policy, and public service. I had a peripatetic childhood, moving between eight countries on four continents. When I moved to the U.S. for college, I pursued funded political science research in France and the American South, building on government internships in Mozambique, Germany, and Denver. Following graduation, I served as a bridge between the policy and legal departments at the ACLU of Colorado, where I wrote major legislation, led state-wide campaigns including the successful repeal of the death penalty, and supported winning lawsuits. At law school, I developed strong legal writing skills in my research assistant roles and as senior articles editor. During summer internships and a clinic, I wrote legal memos, drafted affidavits and briefs, and counseled clients for federal cases.

Most recently, while working on a lawsuit defending the rights of children held at psychiatric facilities and assessing the procedural hurdles that keep prisoners out of court, I have become invested in the everyday decisions that shape most people's experiences with the justice system. The cases on which I have worked, including a *Monell* claim challenging unconstitutional policing, a negligence claim against gun manufacturers following a mass shooting, and challenges to city ordinances criminalizing homelessness, capture my vision of channeling the law to craft a better world. Through this clerkship, I hope to understand what guides judicial decision-making, prepare for my career as an impact litigator, and apply my legal skills to champion everyday justice.

Enclosed please find my résumé, transcript, and writing sample. The writing sample is a memo prepared during the Civil Rights Clinic. Also enclosed are letters of recommendation from Professors Deborah Archer (212.998.6473), Barry Friedman (212.998.6293), and Rachel Barkow (212.992.8829). If you have any questions, please feel free to contact me at the above address and telephone number. Thank you for your consideration.

Respectfully,

Helen Griffiths

Helen Griffiths

HELEN GRIFFITHS

hbg8394@nyu.edu | 719-679-7084

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY Sep 2021 – Present
Honors: - *Furman Public Policy Scholar*, full merit scholarship awarded to two students annually
- *Birnbaum Women's Leadership Fellow,* selective program awarded to 12 students
- *2023 Next Generation Leaders Program*, national American Constitution Society award
Activities: - *Senior Articles Editor*, N.Y.U. Journal of Law & Social Change; *President*, NYU Law American Constitution Society; *Co-Chair*, Law Women Advocacy Committee

COLORADO COLLEGE, Colorado Springs, CO Aug 2014 – May 2018
BA in Political Science, Phi Beta Kappa
Honors: - *Distinction in the Major; Fred Sondermann Award* for excellence; *First Year Writer's Award*
Activities: - *Founder of Democratic Dialogue Project*, fosters discussions with Air Force Academy students

PROFESSIONAL EXPERIENCE

EVERYTOWN LAW, *Litigation Intern*, New York, NY May 2023 – Present

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
Research Assistant to Professor Rachel Barkow & Professor Barry Friedman May 2022 – Present
Researched comparative clemency for article; contributed to article on the federal government's role in policing
Policing Project Legal Intern May 2022 – Sept 2020
Wrote memos assessing legal claims for litigation against police departments; analyzed national legislation

ACLU OF COLORADO, Denver, CO
Public Policy Strategist Aug 2020 – Aug 2021
Coordinated Redemption Campaign to expand clemency, including authoring report, leading ad campaign with Denver Broncos, and preparing affidavits for two lawsuits; drafted three bills and testified on four bills
Public Policy Associate Aug 2018 – Aug 2020
Led successful campaign to end the death penalty, including coordinating the coalition and bill rollout
Public Policy Fellow Aug 2018 – Aug 2019
Wrote legal letters to sheriffs that prompted changes to municipal laws to decriminalize homelessness; testified on four bills; drafted two bills; produced legal memos; presented during statewide bail commission

COLORADO COLLEGE, Colorado Springs, CO
Political Science Department Research Assistant May 2017 – Aug 2017 and May 2018 – Aug 2018
Drafted chapter for professor's book on political identification; developed a model of political ideology
Residential Adviser Aug 2015 – May 2017
Organized events; counseled students; selected by Sustainability Office as one of two Eco-RAs
Political Science Department First Year Mentor Jan 2017 – May 2017
Coordinated discussion groups; reviewed and edited class papers; wrote model essays; created study guides
Staff Writer for the Catalyst Newspaper Oct 2014 – Oct 2015
Investigated and reported on campus events, one feature was referenced by *The Economist*

SENATOR MICHAEL BENNET, *Intern*, Denver, CO Sept 2016 – Dec 2016
Advocated with state and municipal agencies on immigration issues; summarized bills on healthcare

CONGRESSWOMAN DIANA DEGETTE, *Intern*, Denver, CO Sept 2016 – Dec 2016
Drafted remarks for Congresswoman; wrote policy briefs on healthcare; managed constituent casework

MARSHALL CENTER FOR EUROPEAN SECURITY STUDIES, *Research Assistant,* Germany May 2016 – Aug 2016
Supported execution of graduate-level program in national security for 120 international participants

U.S. EMBASSY, Mozambique
Public Health Communications Intern / Public Affairs Intern May 2014 – Aug and May 2015 – Aug 2015
Organized nationwide campaign to destigmatize HIV; researched strategies for youth adherence to antiretrovirals

Name: **Helen B Griffiths**
Print Date: **06/07/2023**
Student ID: **N11078124**
Institution ID: **002785**
Page: **1 of 1**

New York University
Beginning of School of Law Record

Fall 2021

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Faraz Sanei			
Criminal Law	LAW-LW 11147	4.0	A
Instructor: Anna N Roberts			
Torts	LAW-LW 11275	4.0	B
Instructor: Daniel Jacob Hemel			
Procedure	LAW-LW 11650	5.0	A
Instructor: Troy A McKenzie			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Barry E Friedman, Farhang Heydari			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2022

School of Law
Juris Doctor
Major: Law

Constitutional Law	LAW-LW 10598	4.0	B+
Instructor: Melissa E Murray			
Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Faraz Sanei			
Legislation and the Regulatory State	LAW-LW 10925	4.0	B+
Instructor: Samuel J Rascoff			
Contracts	LAW-LW 11672	4.0	B+
Instructor: Clayton P Gillette			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Barry E Friedman, Farhang Heydari			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2022

School of Law
Juris Doctor
Major: Law

The Law of Democracy	LAW-LW 10170	4.0	B+
Instructor: Samuel Issacharoff, Richard H Pildes			
Evidence	LAW-LW 11607	4.0	B
Instructor: Erin Murphy			
Property	LAW-LW 11783	4.0	B
Instructor: Cynthia L Estlund			
Religion and the First Amendment	LAW-LW 12135	2.0	IP
Instructor: Schneur Z Rothschild, John Sexton			
The First Amendment's Religion Clauses	LAW-LW 12841	1.0	IP
Instructor: Schneur Z Rothschild, John Sexton			

	AHRS	EHRS
Current	15.0	12.0
Cumulative	45.0	42.0

Spring 2023

School of Law
Juris Doctor
Major: Law

Criminal Procedure: Post Conviction	LAW-LW 10104	4.0	A
Instructor: Emma M Kaufman			
Civil Rights Clinic Seminar	LAW-LW 10559	4.0	A
Instructor: Deborah Archer, Joseph Schottenfeld			
Civil Rights Clinic	LAW-LW 10627	3.0	A
Instructor: Deborah Archer, Joseph Schottenfeld			
Research Assistant	LAW-LW 12589	2.0	CR
Instructor: Barry E Friedman			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	58.0	55.0

Staff Editor - Review of Law & Social Change 2022-2023

End of School of Law Record

Griffiths, Helen ID: 142195
Program: Bachelor of Arts
Overall GPA: 3.95699
Major: Political Science, GPA 4.00000

	TR	CP	CL	Credit	Grade	Total Credits
Int Baccalaureate Diploma						
History: Africa				2.000		2.000
Theatre				2.000		4.000
English A				2.000		6.000
French B				1.000		7.000
Environ Systems & Societ				1.000		8.000
			Total	**8.000**		
Fall 2014 *Dean's List*						
COLORADO COLLEGE						
P Sc 150 Fundamental Debates on the Common Good	G	CPW		2.000	A	10.000
Engl 290 The Birth of the American Novel	G			1.000	B+	11.000
Anth 102 Cultural Anthropology	G	CPGS		1.000	A-	12.000
			Fall 2014 - Total	**4.000**		
Spring 2015 *Dean's List*						
COLORADO COLLEGE						
P Sc 234 Freedom and Empire: The Drama of Ancient Politics	G			1.000	A	13.000
P Sc 209 Introduction to International Relations (Writing in the Discipline)	G			1.000	A	14.000
Env Sci 128 Introduction to Global Climate Change	P	CPIQ		1.000	S	15.000
P Sc 200 American Politics and Government	G			1.000	A	16.000
Fren 302 Review of French with Emphasis on French/Francophone Civilizations and Cultures	G			0.250	A	16.250
			Spring 2015 - Total	**4.250**		
Fall 2015						
COLORADO COLLEGE						
P Sc 236 Introduction to Comparative Politics (Writing in the Discipline)	G			1.000	A	17.250
P Sc 321 Public Policymaking	G			1.000	A	18.250
P Sc 317 The American Founding (Writing in the Discipline)	G			1.000	A	19.250
P Sc 301 Europe and its Governments:	G			1.000	A	20.250
Fren 301 Review of French with Emphasis on French/Francophone Civilizations and Cultures	G			0.250	A	20.500
			Fall 2015 - Total	**4.250**		
Spring 2016						
COLORADO COLLEGE						
P Sc 313 Comparative Politics: The Middle East and North Africa (Writing in the Discipline)	G	CPG		1.000	A	21.500
P Sc 270 Liberty & Equality	G			1.000	A	22.500

Griffiths, Helen ID: 142195
Program: Bachelor of Arts
Overall GPA: 3.95699
Major: Political Science, GPA 4.00000

	TR	CP	CL	Credit	Grade	Total Credits
P Sc 211 Women, Government and Public Policy	G			1.000	A	23.500
Psyc 100 Introduction to Psychology: Bases of Behavior	P	CPL		1.000	S	24.500
Fren 302 Review of French with Emphasis on French/Francophone Civilizations and Cultures	G			0.250	A	24.750
Econ 111 Personal Financial Planning	P			0.500	S	25.250
Spring 2016 - Total				**4.750**		
Spring 2017						
COLORADO COLLEGE						
P Sc 203 Topics in Politics: International Politics of Energy and Climate Change: Sustainability and Security	G			1.000	A	26.250
Fren 304 Cultural Context and Oral Practice	G			1.000	A	27.250
Fren 306 Cultural Context and Critical Analysis	G			1.000	A	28.250
P Sc 203 Topics in Politics: Methods (Writing in the Discipline)	G			1.000	A	29.250
Fren 302 Review of French with Emphasis on French/Francophone Civilizations and Cultures	G			0.250	A	29.500
Spring 2017 - Total				**4.250**		
Spring 2018						
COLORADO COLLEGE						
Env Sci 271 Environmental Policy	G			1.000	A	30.500
P Sc 450 Political Science Thesis:Accueillir L'Etranger Immigration, Politics and the French Catholic Church	G			2.000	A	32.500
Env Sci 374 Environmental Law and Policy for the Global Commons	G			1.000	A	33.500
Span 204 Oral Review of Intermediate Spanish	G			0.250	A	33.750
Spring 2018 - Total				**4.250**		
Overall - Total				**33.750**		

Bachelor of Arts degree
granted May 16, 2018
Political Science
magna cum laude
Distinction in Political Science

NYU | LAW

DEBORAH N. ARCHER
Associate Dean for Experiential Education and Clinical Programs
Professor of Clinical Law

NYU School of Law
245 Sullivan Street, 610
New York, New York 10012

P: 212 998 6528
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deborah.archer@nyu.edu

June 08, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Helen Griffiths

Dear Judge Walker:

I am Associate Dean for Experiential Education and Clinical Programs and Professor of Clinical Law at NYU School of Law. I am also President of the ACLU. I am writing to enthusiastically recommend Helen Griffiths as a law clerk in your chambers. I have had the pleasure of getting to know Helen as one of ten students in my intensive Civil Rights Clinic and seminar. Helen stood out for her rigor, intellect, and tenacity. Her thoughtful participation in class reflected a deep engagement with the materials and a probing intellect exploring novel areas of the law. In group meetings, she displayed a remarkable capacity for introspection and a desire to tackle new challenges. Her inspiring work ethic, capacity to effectively manage multiple cases, and strong legal analysis would make her a brilliant clerk.

Throughout the clinic, she demonstrated superior legal research, writing, and investigative skills. During the investigation phase for a potential lawsuit, Helen deftly managed records requests and reviewed responsive documents. She quickly forged productive relationships with other attorneys and activists involved in the cases. In countless calls, emails, and texts, she built a network of attorneys, care providers, reporters, and families. She brings such empathy to her work that she managed to build meaningful relationships with clients who felt comfortable confiding in her during difficult conversations, including some who shared experiences of sexual and physical assault. In other settings, she has forged professional partnerships, including presenting claims to a law firm and meetings with potential co-counsel.

In a dozen legal memos, she displayed excellent legal research and writing skills. In a landscaping memo on a state's behavioral health care system, a memo assessing the variety of potential claims, and a summary of factual research, she succinctly captured the necessary information about a case. Her work reflects a thorough, focused approach to addressing all potential questions. For one memo, she reviewed all NYPD procedures, summarized law review articles, and conducted long-form interviews. Helen understands the importance of applying the law in changing contexts. In a memo concerning the history of removal of Native American children from their communities, she sought to ground her current work in the real-world consequences of prior decisions. Her strong writing is only matched by her commitment to applying her skills to improve the lives of others.

Helen demonstrated resilience in the face of challenges during the course. When faced with a broad issue to resolve, she channeled team efforts into a strategy that she spent the semester executing with skill. Though she had limited prior experience concerning substantive due process claims, she dove into the material. She read every case in the circuit to assess how the court applied the professional judgment standard. She analyzed the state's statutes for potential weaknesses. She indefatigably reviewed hundreds of trial court cases raising procedural due process claims. In a significant prelitigation memo, her cogent analysis covered a variety of thorny issues, such as finding state action when suing a private party and suing the state for the actions of third parties. She also authored a thorough memo analyzing Fourth Amendment law that included nuanced state-level inquiries into arrest standards. She identified several areas that were ripe for challenge and assessed the strengths and weaknesses of each. In other memos, she analyzed the procedural requirements, legal standards, and remedies for a variety of constitutional claims.

Helen also channels her passion and hard work outside of class. In her first year, she spoke to a 90-person law class, developed a biweekly reading group for 1Ls, and tutored formerly incarcerated students who are attending college. The next year, she launched fundraisers for nonprofits, led 45 NYU Law students on a voter protection trip to Pennsylvania, and organized three events with 215 attendees. Her advocacy and leadership have been recognized. She was selected as part of NYU Law's Women's Leadership Training Program and as a student speaker at the National Legal Aid & Defender Association's Annual Conference. Whether in class or in the broader world, she has applied her exceptional legal skills to advocate for a more just future.

I believe Helen would be a great addition to your team. If I can provide any further information, please don't hesitate to let me know.

Sincerely,

Deborah Archer - deborah.archer@nyu.edu - 212-998-6528

Deborah N. Archer
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Rachel E. Barkow
Charles Seligson Professor of Law
Faculty Director, Zimroth Center on the Administration of Criminal Law

June 9, 2023

RE: Helen Griffiths, NYU Law '24

Dear Judge:

I am writing to recommend Helen Griffiths for a clerkship in your Chambers. Helen was my research assistant the summer after her 1L year, and her work was outstanding in all respects. She is a clear and effective writer, a thorough researcher with excellent judgment, and an all-around brilliant, analytical thinker who is a delight to work with.

Helen assisted me with a variety of research projects related to executive clemency. One of the reasons I hired her was her experience working on clemency issues in Colorado, and the combination of her real-world understanding and top-notch research and writing skills produced one first-class memo after the other.

She summarized various state clemency practices and approaches, described changes to clemency practice around the country in response to the COVID-19 pandemic, summarized law review articles on clemency, and surveyed different international approaches to clemency. Each memo was well written and rich with material for my project. Her judgment about what to include was impeccable, and I appreciated that she presented some of the information in chart form in addition to a traditional narrative format because it made it so easy to use and reference. One of the research assignments required her to explore justifications for clemency, and she did a terrific job exploring different historical and philosophical arguments that have been raised by politicians, judges, and academics. She knows how to take complicated material and translate it to its main points, and she has excellent judgment about what to focus on and what is tangential.

Helen is dedicated to working in the public interest and already amassed an impressive track record of public service before coming to law school. She worked for three years at the ACLU of Colorado and assisted with a wide range of projects,

performing legal research, drafting legislation, conducting client interviews, and engaging in public policy strategies. She managed three statewide campaigns, including one to expand clemency in Colorado. I was familiar with this campaign even before I met Helen and was so impressed to discover she was behind it. Helen is someone who gets things done with her intelligence, hard work, and commitment.

She has been just as active during her time at NYU. She organized two events in her role as 1L representative for the American Constitution Society (ACS). One addressed the role lawyers can play in ending mass incarceration and the other focused on women in law and government. Both events were well attended and highly praised for the quality of the discussion. Helen moderated the mass incarceration event and did a terrific job. She became the president of NYU's ACS chapter during her second year and has done a terrific job expanding mentoring opportunities for students and continuing to sponsor great events. In addition, she spearheaded a voter protection initiative in Pennsylvania and carved out time each week during her busy 1L year to tutor formerly incarcerated students.

Helen is committed to using her law degree to improve the lives of others. After she graduates, she hopes to work on impact litigation and eventually work as a policy or legal director advocating for civil liberties. Along the way, she would love to clerk for a federal district judge, and I have every confidence she will shine in that capacity. She has the skill set to thrive as a clerk. She is great at multi-tasking, getting through complicated material quickly, writing clearly, and researching anything you need. She is also a joy to be around, as she always has a positive attitude and is kind to everyone. I think you will love working with her.

If I can be of further assistance, please do not hesitate to contact me.

Sincerely,

Rachel Barkow

Barry Friedman
Jacob D. Fuchsberg Professor of Law
Affiliated Professor of Politics
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Dear Judge,

I am writing on behalf of Helen Griffiths, who is applying to clerk for you any time after graduating from law school in the Spring of 2024. Helen has been my student and my research assistant. She is really great, and I am happy to recommend her to you.

I met Helen in my 1L Reading Group on Big Brother Policing, which dealt with emerging technologies and their use in persistent surveillance. We wanted the students to understand how those technologies might be regulated under various legal regimes (Fourth Amendment, statutory, etc.), and what regulation might look like. Helen was a standout. She was completely prepared for all sessions, even though these Reading Groups are pass/fail, and she came with intelligent things to say. She was a spark.

Based on my exposure to her throughout the year, I asked Helen to do not one, but two, things with me the following summer. First, she was my Research Assistant. She worked closely with me on an article on The Federal Role in Local Policing. Her assignment was the Spending Clause, how it had been used to facilitate police reform, how and why it failed to accomplish this, and what might be done to improve. The result was a series of memoranda including one large one that I believe she is using as a writing sample. I also asked her to intern at the Policing Project, a center I run at the law school. She had intended to work full time, and RA part time, and so I snapped up all of her that I could.

I've continued to work with Helen since, and it will be pertinent to you to understand why I went all in on her for assistance. First, Helen has boundless energy. She's a tireless worker, either for causes she believes in, or to learn about law and where there is room for social change. Second, she's incredibly responsible. When she says she will do something, she does it, on time. Third, she's tenacious about legal research, and has unearthed a great deal of information for me in a short amount of time. She's smart, writes clearly, and is utterly reliable.

I want to flag Helen's grades in the Spring of 2023, because they are fantastic. They represent the Helen I know. Her grades were fine throughout, but I never felt they indicated how smart I always found Helen to be. I can see that the methodology of exam-taking finally has kicked in, and I am delighted. Trust me, Helen is very bright.

Helen plans to work on social change and impact litigation. What Helen she accomplished in numerous law school activities, in leadership roles, is nothing short of spectacular. She has worked on voter protection, set up reading groups on the Dobbs decision, organized major school events, and been a Senior Articles Editor for the Journal on Law and Social Change. She's going to be a major force for change in the world.

As a person, it is extremely easy to warm up to Helen. She has a big heart, and always wants to do the right thing. She is game for almost anything. She has lived all over the world, and is both down to earth and cosmopolitan. I like her very much.

Helen is going to be a great clerk for the right judge. She is going to work hard to make your life easier and your work product better.

I am happy to answer any questions.

Best regards,

Barry Friedman

This writing sample is an excerpt from a longer prelitigation memo that summarizes factual and legal arguments in preparation for a lawsuit as part of the Civil Rights Clinic. All references to specific states or entities have been omitted. Some facts have also been altered to preserve anonymity. This memo is being shared with permission from my professors.

To: Deborah Archer & Joe Schottenfeld
From: Helen Griffiths
Subject: Prelitigation Memo
Date: April 25, 2023

I. Introduction

As prior memos, extensive conversations, and fact research make clear, children in the state are being over-institutionalized in harmful conditions. This memo details possible legal claims. We are considering claims under 1) the Medicaid Act, 2) the Americans with Disabilities Act & § 504 of the Rehabilitation Act, 3) the False Claims Act, and 4) substantive due process.

Given current information, Medicaid, ADA/Rehab, and False Claims present the strongest claims, dependent on facts. Substantive due process is viable but requires finding state action. As we work to secure local counsel and identify clients, this analysis may change.

II. Analysis

A. Substantive Due Process

We are considering a 42 U.S.C. § 1983 lawsuit alleging a violation of the Fourteenth Amendment's substantive due process right to safe physical conditions while in involuntary state custody. However, the line of cases developing this substantive due process right concerns state-run facilities. Since [redacted] is a private facility, we must first show that there is state action sufficient to support a Fourteenth Amendment claim. This is a highly fact-intensive inquiry with numerous different tests. Assuming we are able to show that there is state action, we would then need to allege a violation of a protected liberty interest. This would be easily satisfied under *Romeo*. We would also have to show that the [redacted] administrators departed from accepted professional judgment, violating the plaintiff's right to safety at the facility. This is likely also satisfied. An alternative avenue to bringing a substantive due process claim would be to sue the state for the actions of a third party, in this case, [redacted]. In order to bring a substantive due process claim against the state for their failure to act and protect the liberty interests of children at [redacted], we would need to show a special relationship or state-created danger exception. Again, we could likely show that one or both of these exceptions exist.

The elements necessary to bring a substantive due process violation are not difficult to meet in this case. Instead, the complications concern the fact that [redacted] is a private entity. Whether we sue [redacted] or the state for [redacted]'s actions, we must navigate threshold issues involving multi-factor tests before reaching the merits of the substantive due process claim. Overall, it is more likely we would want to bring the claim against [redacted]. We have a strong argument for a close nexus between [redacted] and the state sufficient to find state action, as well as evidence to suggest a departure from the reasonable professional standard that amounts to a violation of children's protected liberty interests.

1. Suing a Private Actor for a 14th Amendment Violation

a. Necessity of Finding State Action When Suing a Private Party

To succeed on a Section 1983 claim, a plaintiff must show that "(1) the conduct complained of was committed by a person acting under color of state law; and (2) the conduct deprived the plaintiff of a federal constitutional or statutory right."[1] Section 1983 provides remedies for deprivations of rights under the Constitution and laws of the United States when the deprivation takes place "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory."[2] The Supreme Court has found that "Section 1983 excludes from its reach merely private conduct, no matter how discriminatory or wrong."[3] Similarly, the Ninth Circuit ruled that Section 1983 is only an appropriate cause of action when "the alleged injury is caused by state action and not by merely a private actor."[4] Thus, a threshold question in a Section 1983 suit is whether the challenged action took place "under color of state law."[5] Much like Section 1983 claims, "a violation of the plaintiff's constitutional rights cognizable under the Fourteenth Amendment can occur only by way of state action."[6] The Supreme Court has found that conduct actionable under Section 1983's "under color of law" requirement is equivalent to the "state action" requirement under the Constitution.[7]

b. Finding State Action When Suing a Private Party

Since the default assumption is that "private parties are not generally acting under color of state law," in order for private conduct to constitute governmental action, "something more" must be present.[8] The plaintiff bringing the suit against the private party bears the burden of establishing by a preponderance of the evidence that this "something more" exists.[9] To establish whether the private party is acting under color of state law, the Ninth Circuit first identifies the "specific conduct of which the plaintiff complains."[10] After all, "[a]n entity may be a state actor for some purposes but not for others."[11] In our claim, we would likely challenge the unsafe conditions at [redacted]. The relevant inquiry is therefore whether the "defendants' role as custodians, as litigants, or as medical professionals constituted state action."[12]

There are several Supreme Court cases where the "defendant is a private party and the question is whether his conduct has sufficiently received the imprimatur of the State so as to make it 'state' action for

[1] Patel v. Kent Sch. Dist., 648 F.3d 965 (9th Cir. 2011) (finding that since the parties did not dispute that the defendant was acting under color of state law, the sole issue is whether the defendant deprived the plaintiff of any federally protected right).
[2] 42 U.S.C. § 1983 ("Every person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured.").
[3] Blum v. Yaretsky, 457 U.S. 991, 1002 (1982) (quoting Shelley v. Kraemer, 334 U.S. 1, 13 (1948)).
[4] Jensen v. Lane Cnty., 222 F.3d 570, 574 (9th Cir. 2000).
[5] Jackson v. Metro. Edison Co., 419 U.S. 345, 348 n.2 (1974).
[6] Rawson v. Recovery Innovations, Inc., 975 F.3d 742, 747 (9th Cir. 2020). Since the Fourteenth and Fifth Amendments are directed at the State, courts have held that they offer "no shield" against private conduct and can only be violated by conduct that is characterized as state action. *Kraemer*, 334 U.S. at 14; Lugar v. Edmondson Oil Co., 457 U.S. 922, 924 (1982).
[7] United States v. Price, 383 U.S. 787, 794 n.7 (1966) ("In cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment."). *See also* Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982) (quoting *Lugar*, 457 U.S. at 937) ("The ultimate issue in determining whether [the Defendants are] subject to suit under § 1983 is the same question posed in cases arising under the Fourteenth Amendment: is the alleged infringement of federal rights 'fairly attributable to the State?'"); Kitchens v. Bowen, 825 F.2d 1337, 1340 (9th Cir. 1987) (quoting Geneva Towers Tenants Org. v. Federated Mortgage Investors, 504 F.2d 483, 487 (9th Cir. 1974)) (finding that "the standards utilized to find federal action . . . are identical to those employed to detect state action.").
[8] Price v. Hawaii, 939 F.2d 702, 707-08 (9th Cir. 1991), *cert. denied*, 503 U.S. 938 (1992); *Lugar*, 457 U.S. at 939 ("Action by a private party pursuant to [section 1983] without something more, was not sufficient to justify a characterization of that party as a 'state actor.'").
[9] Flagg Bros. v. Brooks, 436 U.S. 149, 156 (1978).
[10] Caviness v. Horizon Cmty. Learning Ctr., Inc., 590 F.3d 806, 812 (9th Cir. 2010) (quoting Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 51 (1999)).
[11] George v. Pacific–CSC Work Furlough, 91 F.3d 1227, 1230 (9th Cir.1996).
[12] *Rawson*, 975 F.3d at 747.

purposes of the Fourteenth Amendment."[13] The Supreme Court has articulated at least seven approaches to the issue.[14] Different Ninth Circuit cases have sought to distill these approaches into a number of tests to assess state action, all while finding that the Supreme Court failed to characterize whether "these different tests are actually different in operation or simply different ways of characterizing the necessary fact-bound inquiry."[15] Generally, the tests are: (1) public function; (2) joint action; (3) governmental compulsion or coercion; and (4) governmental nexus.[16] As the Ninth Circuit summarizes: "The Supreme Court, even in its most recent pronouncement on state action, does not clarify whether and when one test or another should be applied to a particular fact situation."[17] As a result, the Ninth Circuit has been reluctant to endorse a singular approach, though the Court has held that "satisfaction of any one test is sufficient to find state action, so long as no countervailing factor exists."[18] Generally, the Ninth Circuit favors applying the close nexus test, which is also the most vague and open-ended.[19] The joint action or close nexus tests are likely the easiest for us to satisfy.

While these tests provide some helpful guiding principles, it is difficult to predict exactly how these facts would shake out. The Supreme Court has repeatedly cautioned that while the principle of "state action" is "easily stated, the question of whether particular discriminatory conduct is private, on the one hand, or amounts to 'state action,' on the other, frequently admits of no easy answer."[20] The Supreme Court acknowledges this issue lacks any consistency and the Ninth Circuit remarked on the "murkiness shrouding this area of law."[21] That ambiguity is because the inquiry into state action is highly fact intensive and courts do not apply the same test in the same way.[22] Overall, the Supreme Court found: "What is fairly attributable [as State action] is a matter of normative judgment, and the criteria lack rigid simplicity.... [No] one fact can function as a necessary condition across the board ... nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason."[23] As a result, it is unclear how a court would rule concerning a finding of state action in our case, though there is likely evidence sufficient to satisfy a close nexus test.

Finally, there is clear Ninth Circuit precedent that "when purely private actors obtain the help of a private physician to bring about the involuntary admission and detention of an allegedly mentally ill person for psychiatric examination," there is no state action.[24] Thus, it might be difficult to bring a challenge if the plaintiff was committed after approval from their parents, since they are private actors, acting with the aid and oversight of [redacted], another private employee. It would be a stronger challenge if the plaintiff were in the foster care system as this would implicate state involvement. The analysis below thus assumes our plaintiff is a foster child involuntarily committed.

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[13] *Blum*, 457 U.S. at 102. *See, e.g.*, *Flagg Bros.*, 436 U.S. at 149; *Jackson*, 419 U.S. at 345; Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970).
[14] Lee v. Katz, 276 F.3d 550, 554 (9th Cir. 2002).
[15] Gorenc v. Salt River Project Agr. Imp. & Power Dist., 869 F.2d 503, 506 (9th Cir. 1989).
[16] *Lee*, 276 F.3d at 554.
[17] Kirtley v. Rainey, 326 F.3d 1088, 1095 (9th Cir. 2003).
[18] *Id.* at 1093. *See, e.g.*, *George*, 91 F.3d at 1230; *Gorenc*, 869 F.2d at 506.
[19] Grijalva v. Shalala, 152 F.3d 1115, 1119 (9th Cir. 1998).
[20] *Moose Lodge*, 407 U.S. at 172.
[21] *George*, 91 F.3d at 1230.
[22] Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961) ("Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."); Howerton v. Gabica, 708 F.2d 380, 383 (9th Cir. 1983) ("While these factors are helpful in determining the significance of state involvement, there is no specific formula for defining state action."); *Lugar*, 457 U.S. at 939 ("The Court suggested that 'something more' which would convert the private party into a state actor might vary with the circumstances of the case."); Ouzts v. Maryland Nat'l Ins. Co., 505 F.2d 547, 550 (9th Cir. 1974) ("It is also a truism by now that there is no rigid formula for measuring state action for purposes of section 1983 liability.").
[23] Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n., 531 U.S. 288, 295-96 (1974).
[24] *Jensen*, 222 F.3d at 574.

(i) Public Function Test

Under the public function test, "when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations."[25] Essentially, "if a private actor is functioning as the government, that private actor becomes the state for purposes of state action."[26] To satisfy the public function test, the private entity must be exercising a power or function both traditionally and exclusively governmental.[27] The more a private actor opens up their property or product for "use by the public in general, the more do his rights become circumscribed by statutory and constitutional rights of those who use it."[28]

The Ninth Circuit has applied a version of this test to find state action in a suit where a patient involuntarily committed at a private hospital brought a Section 1983 action against the operator of the hospital for forcibly injecting him with antipsychotic medications in violation of his Fourteenth Amendment due process rights. The Court considered whether the defendant "exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'"[29] The Court found that: "Any deprivation effected by Defendants here was in some sense caused by the State's exercise of its right, pursuant to both its police powers and parens patriae powers, to deprive [plaintiff] of his liberty for an extended period of involuntary civil commitment. In that sense, Defendants were 'clothed with the authority of state law' when they detained and forcibly treated [the plaintiff] beyond the initial 72-hour emergency evaluation period."[30] While the Supreme Court has held that mental health commitments do not constitute a function "exclusively reserved to the State," the Ninth Circuit found that since the private actors were relying on the state's power to civilly commit people, any misuse of this power, such as violating the plaintiff's right to "liberty, refusal of treatment, and/or due process," was an action under color of state law.[31] We could similarly argue that [redacted] exercised state power when holding children following involuntary commitment proceedings, rendering their actions "under color of state law." However, we are more likely to succeed by using this argument to support the joint action test below than to satisfy the public function test. [Redacted] can neither detain nor forcibly treat a mental health patient past an initial 72-hour emergency evaluation period without a court order. Thus, the government still retains the ultimate power to involuntarily commit and hold children.

(ii) Compulsion Test

Under the compulsion test, a private actor's conduct is attributable to the state when the state exerts coercive power over the private entity or provides significant encouragement.[32] Under this test, a private entity does not act as the state unless some state law or custom requires a certain course of action.[33] The compulsion analysis is most often applied in cases in which the government itself compels a certain outcome, such as a city ordinance requiring racial segregation or a city ordinance banning sit-ins, and in which the private entity, while engaging in the unlawful act, was pressured to do so.[34] Here, the state is not compelling [redacted] to violate children's substantive due process rights through any statute. While there is a statutory scheme concerning the involuntary commitment process, there is no statute requiring subpar conditions, which is the issue we are challenging. We could, however, argue that there is significant encouragement since the state sends considerable funds to [redacted]. In 2018, 30% of all children on

[25] Evans v. Newton, 382 U.S. 296, 299 (1966).
[26] *Gorenc*, 869 F.2d at 508.
[27] *Rendell–Baker*, 457 U.S. at 842.
[28] Marsh v. Alabama, 326 U.S. 501, 506 (1946).
[29] *Rawson*, 975 F.3d at 746; West v. Atkins, 487 U.S. 42, 49 (1988) (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).
[30] *Rawson*, 975 F.3d at 752.
[31] *Id. See also Jackson*, 419 U.S. at 352.
[32] *Flagg Bros*., 436 U.S. at 164–65; *Adickes*, 398 U.S. at 170-71.
[33] *George*, 91 F.3d at 1233.
[34] Peterson v. City of Greenville, 373 U.S. 244 (1963); Lombard v. Louisiana, 373 U.S. 267, 271 (1963).

Medicaid receiving out-of-home behavioral health care were at [redacted].[35] The state channeled $18,000,000 in state funds to [redacted] in 2018.[36] Between 2016 to 2020, the state paid $125 million in reimbursements to [redacted].[37] In response to our evidence of state funding, [redacted] could refer to Supreme Court cases noting that substantial funding for private actors is not sufficient to transform the party's conduct into state action, or a Ninth Circuit case finding that a private hospital's receipt of federal funds, coupled with federal and state tax exemptions, did not constitute state action.[38] It is unlikely that the state's funding of [redacted] is sufficient to show compulsion, but it would be a factor to consider under the joint action and close nexus tests below.

(iii) Joint Action Test

Under the joint action test, private actors will be considered state actors where they are "willful participant[s] in joint action with the State or its agents" or where the state has "so far insinuated itself into a position of interdependence with the [private actor, such] that it must be recognized as a joint participant in the challenged activity."[39] If the state "knowingly accepts the benefits derived from unconstitutional behavior," then the conduct can be treated as state action.[40] A final factor suggesting joint action concerns the state's Fourteenth Amendment obligation toward those who are involuntarily committed.[41] The Ninth Circuit previously found that a government cannot simply "contract away its constitutional duties" by having private actors, rather than state actors, perform some of the work.[42] Accordingly, there may be joint action when a state has delegated away a portion of its role because the state owes "particular Fourteenth Amendment duties toward persons involuntarily committed" that weigh toward a finding of state action.[43]

We could argue that there is joint action between the state and [redacted]. There are only two acute psychiatric care centers, [redacted] and [redacted], in the state, rendering [redacted] an essential feature of the state's out-of-home behavioral health care.[44] [Redacted] is the only state-run facility and can hold only around ten adolescents.[45] With such low capacity, the state relies on [redacted] to hold the children who need care and there is a close relationship between the state and private entity. Furthermore, this close relationship likely includes contracts between [redacted] and the state to provide services. However, a contract alone is not sufficient to find state action.[46] We could also argue that the state benefits from [redacted]'s confinement of the children since the state has nowhere else to send foster care children with mental health issues.[47] However, the Ninth Circuit has found no joint action exists when benefits "flow directly to [individuals], not to the state itself," even while "in a broad sense" conferring public benefits.[48] [Redacted] would likely argue that their services are to support children, not to aid the state government by helping to compensate for their lack of services and appropriate foster homes. Overall, there may be a joint

[35] [Redacted].
[36] *Id.* at 52.
[37] [Redacted].
[38] *Blum*, 457 U.S. at 1011; Ascherman v. Presbyterian Hosp. of Pac. Med. Ctr., Inc., 507 F.2d 1103, 1104-05 (9th Cir. 1974).
[39] Dennis v. Sparks, 449 U.S. 24, 27 (1980); *Jackson*, 419 U.S. at 357-58.
[40] Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 192 (1988).
[41] Addington v. Texas, 441 U.S. 418, 425 (1979).
[42] Pollard v. GEO Grp., Inc., 629 F.3d 843, 856 (9th Cir. 2010).
[43] *Rawson*, 975 F.3d at 753.
[44] [Redacted].
[45] *Id.*
[46] *Rendell-Baker*, 457 U.S. at 840 (facing the question "whether a private school, whose income is derived primarily from public sources and which is regulated by public authorities, acted under the color of state law when it discharged certain employees" and finding that private actors, whether schools, nursing homes or "private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government," are not state actors "by reason of their significant or even total engagement in performing public contracts.").
[47] [Redacted].
[48] *Rawson*, 975 F.3d at 1093.

action claim concerning the coordination between the state and [redacted] to detain children, but it is likely easier to apply those facts to satisfy the close nexus test.

(iv) Close Nexus Test

Under the close nexus test, there is state action "only if there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'"[49] The essential question in this test is whether the state has become "to some significant extent" involved in the conduct of the affairs of a private institution.[50] For example, in a case of first impression concerning a combined close nexus/joint action test, the Ninth Circuit found that a private psychiatrist was a state actor, because the psychiatrist and the county had: "[U]ndertaken a complex and deeply intertwined process of evaluating and detaining individuals who are believed to be mentally ill and a danger to themselves or others. County employees initiate the evaluation process, there is significant consultation with and among the various mental health professionals, and [Psychiatric Associates] helps to develop and maintain the mental health policies of [the county hospital]."[51]

Similarly, we could argue that there is a "complex and deeply intertwined" process between the state and [redacted] that satisfies the "close nexus" test. There are extensive state regulations concerning the involuntary commitment process. Under the state's involuntary commitment statutory scheme, a judge can either conduct a screening investigation or direct a local mental health professional to conduct a screening investigation of a person with a mental health issue.[52] Often, that "mental health professional" is a [redacted] employee. Within 48 hours of the investigation's completion, the judge may issue an order finding probable cause to believe the person is mentally ill and either gravely disabled or presents a likelihood of serious harm to self or others.[53] A treatment facility, such as [redacted], that receives such an order "shall accept the order and the respondent for an evaluation period not to exceed 72 hours."[54] [Redacted] is able to initially hold children only after a court's finding. The facility then must notify the court of the person's arrival, and the court must schedule a commitment hearing "to be held if needed within 72 hours after the respondent's arrival."[55] At the hearing, the person has the right to attend and present evidence.[56] [Redacted] representatives are often also present to report on what they concluded during the 72-hour stay. If, by the end of hearing, the court "finds, by clear and convincing evidence, that the respondent is mentally ill and, as a result, is likely to cause harm to the respondent or others or is gravely disabled," then "the court may commit the respondent to a treatment facility for not more than 30 days."[57] Again, [redacted] can hold children only following a hearing with state oversight. In response to the argument that this statutory scheme delegates state power to [redacted], they might argue that action by a private party pursuant to a state statute is insufficient, standing alone, to render that party a state actor.[58] They might also argue that the Ninth Circuit has found that "[t]he mere fact that a business is subject to state regulations does not by itself convert its action into that of the state for purposes of the Fourteenth Amendment."[59] We could still argue that the role of state authorization and approval in the commitment process weighs in favor of a finding of state action, while the close, continued coordination between the state courts, the state, and [redacted] personnel goes beyond a mere regulation.

[49] *Brentwood Acad.*, 531 U.S. at 295 (quoting *Jackson*, 419 U.S. at 351).
[50] Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).
[51] *Jensen*, 222 F.3d at 575.
[52] [Redacted].
[53] [Redacted].
[54] [Redacted].
[55] *Id.*
[56] [Redacted].
[57] [Redacted].
[58] Walsh v. Am. Med. Response, 684 F. App'x 610 (9th Cir. 2017).
[59] *Jackson*, 419 U.S. at 350.

Frequently when assessing the question of state action, the Ninth Circuit will consider all the facts alleged under these tests as a whole. For example, in *Jensen*, where the plaintiff brought a Section 1983 action against a private physician alleging unlawful restraint and commitment, the Ninth Circuit concluded that there was state action without explicitly relying on any one test. Instead, the Court cited a long series of evidence: "Given the necessity of state imprimatur to continue detention, the affirmative statutory command to render involuntary treatment, the reliance on the state's police and parens patriae powers, the applicable constitutional duties, the extensive involvement of the county prosecutor, and the leasing of their premises from the state hospital, we conclude that 'a sufficiently close nexus between the state and the private actor' existed here 'so that the action of the latter may be fairly treated as that of the state itself.'"[60] Many of the factors present in Jensen are also present in our case, suggesting the Ninth Circuit could again find state action.

A Tenth Circuit case applying a joint action/close nexus test is also instructive as it involves a suit against the owners and operators of the Provo Canyon School for Boys, a private school and residential treatment facility, alleging violations of Fourteenth Amendment substantive due process rights. The Court found state action: "Many of the members of the class were placed at the school involuntarily by juvenile courts and other state agencies acting alone or with the consent of the parents. Detailed contracts were drawn up by the school administrators and agreed to by the many local school districts that placed boys at the school. There was significant state funding of tuition and, in fact, the school itself promoted the availability of public-school funding in its promotional pamphlet. There was extensive state regulation of the educational program at the school."[61] Many of the facts presented as evidence of state action in that case also exist in ours.

Considering our facts together, we could similarly argue there was state action. After all, the state has delegated the power to detain and treat children to [redacted]; a significant number of children in foster care are held at [redacted]; the state is dependent on [redacted] as the sole provider for children with acute psychiatric needs; significant state funds are sent to [redacted]; the state's Department of Behavioral Health provides some oversight of [redacted]; and the state statutory scheme closely entwines the state and private facility.

2. Elements of a Substantive Due Process Claim

After showing that defendants acted under color of state law, the next step is to show that they deprived the children of a right secured by the Constitution or laws of the United States.[62] The U.S. Constitution forbids governmental deprivation "of life, liberty, or property, without due process of law."[63] This Due Process Clause serves to "provide heightened protection against government interference with certain fundamental rights and liberty interests."[64] In various contexts, the Supreme Court has ruled that this clause imposes substantive limits on government actions when it concerns specifically identified rights.[65] Generally, these rights are tied to an individual's liberty and bodily autonomy.[66] To infringe on these rights, the government must demonstrate sufficient justification.[67] However, unlike procedural due process, substantive due process ensures the right to be free of arbitrary government actions "regardless of

[60] *Jensen*, 222 F.3d at 575 (quoting *Jackson*, 419 U.S. at 350).
[61] Milonas v. Williams, 691 F.2d 931, 940 (10th Cir. 1982).
[62] *Flagg Bros.*, 436 U.S. at 156-57 (1978); Fred Meyer, Inc. v. Casey, 67 F.3d 1412, 1413 (9th Cir.1995).
[63] U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law.").
[64] Washington v. Glucksberg, 521 U.S. 702, 720 (1997); City of Sacramento v. Lewis, 523 U.S. 833, 845-46 (1998).
[65] Moore v. City of East Cleveland, 431 U.S. 494, 502-06 (1977).
[66] Albright v. Oliver, 510 U.S. 266, 272 (1994) (substantive due process protects individual interests "relating to marriage, family, procreation, and the right to bodily integrity"). *See e.g.*, Lawrence v. Texas, 539 U.S. 558, 564 (2003); Loving v. Virginia, 388 U.S. 1, 12 (1967).
[67] United States v. Carolene Prod. Co., 304 U.S. 144, 153 n.4 (1938).

the fairness of the procedures used to implement them."[68] Thus, we could allege that the defendants violated substantive due process rights protected by the Constitution.

a. Finding a Liberty Interest

In order to bring a substantive due process claim, we must first show that there is a liberty interest at risk. The substantive due process guarantees of the Fifth and Fourteenth Amendments apply to people who are involuntarily committed in a state institution since they enjoy a constitutionally protected liberty interest.[69] This interest includes the right to reasonably safe conditions of confinement and the right to freedom from unreasonable restraint.[70] This liberty interest requires "the state to provide minimally adequate or reasonable training" sufficient to safeguard individual safety.[71] People involuntarily committed to a state institution also have Fourteenth Amendment rights to "adequate food, shelter, clothing, and medical care."[72] The Supreme Court has long recognized that individuals possess a fundamental right to personal autonomy, including in medical facilities.[73] The Supreme Court has also recognized a liberty interest in the right to refuse psychotropic medication, the right to be free from censorship of correspondence, and the right to privacy of one's own thoughts.[74] In the Ninth Circuit, there is a Fourteenth Amendment right to "restorative treatment," meaning "mental health treatment that gives them a realistic opportunity to be cured or improve the mental condition for which they were confined."[75] Additionally, the Ninth Circuit has found that "individuals in state custody have a constitutional right to adequate medical treatment" and the state has a similar "Fourteenth Amendment obligation toward those whom it has ordered involuntarily committed."[76] As long as our plaintiff was involuntarily committed, it would be a low bar to allege that [redacted] infringed on a protected liberty interest. Notably, a minor who is committed to [redacted] with the consent of their parents or guardian, is not considered involuntarily committed.[77] However, a child who is committed while in foster care can be considered involuntarily committed. The State Supreme Court found that the state may not "classify an admission as 'voluntary' by asserting an authority that is statutorily reserved for parents and guardians."[78] Therefore, the analysis below assumes that our plaintiff is a child in state custody who has been involuntarily committed.

Relying on these cases, we could bring a claim alleging that [redacted] is failing to provide adequate safety and personal security, freedom from bodily restraint, the right to refuse medication, or a lack of necessary training for those employed at [redacted]. There is evidence supporting several of these claims, though the safety issue is the strongest. From conversations with attorneys and activists in the state, as well

[68] Daniels v. Williams, 474 U.S. 327, 331 (1986).
[69] *Romeo*, 457 U.S. 307, 315-17 (1982) (recognizing that involuntarily committed patients enjoy affirmative rights to state care, protection, and rehabilitation); Ammons v. Wash. Dep't. of Soc. & Health Servs., 648 F.3d 1020, 1027 (9th Cir.2011) ("Involuntarily committed patients in state mental health hospitals have a Fourteenth Amendment due process right to be provided safe conditions by the hospital administrators."). *See also* Ingraham v. Wright, 430 U.S. 651, 673 (1977); Hutto v. Finney, 437 U.S. 678 (1978) (finding that the right to personal security is protected under the substantive Due Process Clause and this right remains when involuntarily confined). The Ninth Circuit has also repeatedly recognized the substantive due process right of involuntarily committed patients to safe confinement conditions. *See* Neely v. Feinstein, 50 F.3d 1502, 1507 (9th Cir. 1995); Flores by Galvez–Maldonado v. Meese, 942 F.2d 1352, 1363 (9th Cir. 1991); Estate of Conners by Meredith v. O'Connor, 846 F.2d 1205, 1207 (9th Cir. 1988).
[70] *Romeo*, 457 U.S. at 315-16, 324.
[71] *Id.* at 319.
[72] *Id.* at 315-18.
[73] Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others."). *See also* Greenholtz v. Neb. Penal Inmates, 442 U.S. 1, 18 (1979) (finding that "[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action").
[74] Procunier v. Martinez, 416 U.S. 396 (1974); Myers v. Alaska Psychiatric Inst., 138 P.3d 238, 244, 248 (Alaska 2006).
[75] Or. Advoc. Ctr. v. Mink, 322 F.3d 1101, 1121 (9th Cir. 2003).
[76] Sandoval v. City of San Diego, 985 F.3d 657, 667 (9th Cir. 2021); *Rawson*, 975 F.3d at 753.
[77] [Redacted].
[78] Matter of April S., 499 P.3d 1011, 1020 (2021).

as publicly available information online, there are clear concerns about the lack of safety. Former [redacted] employees described unsafe conditions at the facility, including multiple riots and regular escapes by at-risk kids. According to state news outlets, between April to September 2022, city police were called to [redacted] 80 times in response to assaults and escapes.[79] In fact, [redacted], who served as a Mental Health Specialist for three months, stated that around once a week, teachers from the city school district refused to enter [redacted] because of dangerous conditions.[80] The local news also reported several cases, including a 14-year-old and 11-year-old, who were sexually abused by other patients at [redacted].[81] The parents allege that the violence is the result of a lack of supervision and staffing shortfalls.[82] In an interview, a state psychiatrist shared that she refuses to refer children to [redacted] after a former patient was repeatedly sexually assaulted for two weeks without any staff intervention. Former staff also attested to the chronic understaffing.[83] In social media groups for former employees, they explain how [redacted] failed to hire, train and retain staff to appropriately oversee young patients with serious mental health needs. We also have a plausible argument alleging the unconstitutional use of restraints. In 2006, advocates raised issues with [redacted]'s staffing, medication, and restraint practices.[84] In 2022, [redacted] failed federal inspections due to the overuse of locked "seclusion rooms" as well as the high number of assaults.[85] Finally, there is evidence of inadequate medical care. In one case, a patient "spent 40 days in the locked facility without receiving a single therapy session."[86] In interviews with children formerly detained at [redacted], they testify to the lack of mental health services and how their experience at the facility only exacerbated their mental health struggles.[87] Overall, we likely have sufficient facts to show a violation of children's liberty interests in safety and personal security.

b. Satisfying the Professional Judgment Standard

As the Court addresses in *Romeo*, it is not sufficient to show that a liberty interest has been infringed.[88] Instead, we would also need to show that "the extent or nature of the restraint or lack of absolute safety is such as to violate due process."[89] Having recognized a constitutional right grounded in the Due Process Clause, the Supreme Court acknowledged the need "to balance 'the liberty of the individual' and 'the demands of an organized society.'"[90] The Ninth Circuit has applied and interpreted *Romeo* as requiring a balance between individual and state interests.[91] In *Romeo*, the Court adopted the professional judgment standard, in lieu of strict scrutiny, or criminal recklessness standards.[92] Under the professional judgment standard, professional administrator's actions will be held unconstitutional if they are "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment."[93] The Court defined a "professional" decisionmaker as someone "competent, whether by education, training or experience, to make the particular decision at issue."[94] The Ninth Circuit has found that the professional judgment standard is an objective test

[79] *Id.*
[80] *Id.*
[81] [Redacted].
[82] *Id.*
[83] [Redacted].
[84] *Id.*
[85] [Redacted].
[86] [Redacted].
[87] *Id.*
[88] *Romeo*, 457 U.S. at 320.
[89] *Id.*
[90] *Id.* at 320 (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961).
[91] *O'Connor*, 846 F.2d at 1208 (explaining that "[u]nder Youngberg's balancing test, the risk of harm and the burden on the state are weighed").
[92] *Romeo*, 457 U.S. at 323, 321-22, 325.
[93] *Id.* at 321-22. *See also Ammons*, 648 F.3d at 1027 (finding that "[w]hether a hospital administrator has violated a patient's constitutional rights is determined by whether the administrator's conduct diverges from that of a reasonable professional").
[94] *Romeo*, 457 U.S. at 323.

and does not require the plaintiff to show that the officials were "subjectively aware of the risk" posed to the patient.[95] This standard is "far more stringent" than an ordinary tort negligence standard.[96]

Under this professional judgment standard, we would have to show that [redacted] employees' conduct diverges from that of a reasonable professional. We could present evidence concerning the lack of care and the use of seclusion rooms as going against standard medical practices.[97] We could also present evidence concerning the pattern of violence and sexual assaults to show that the continued lack of oversight and inadequate training diverges from reasonable behavior. Finally, we could compare [redacted]'s training protocols to those of other hospitals or mental health institutions to find that they have failed professional medical judgment standards in their hiring of unqualified candidates and in their inadequate training. While there is "clearly established law that hospital officials must provide safe conditions for involuntarily committed patients… circumstances under which state hospital officials may be held responsible for failing to do so" is fact-dependent and will likely be shaped by our plaintiffs' individual experiences at [redacted].[98] However, we should be able to show that, in the face of known threats to patient safety, [redacted] employees "failed to take adequate steps in accordance with professional standards to prevent harm from occurring."[99]

3. Suing the State for the Actions of a Third Party

A final possible approach is to bring a Section 1983 claim against the state for failing in their affirmative duty to protect the substantive process rights of the children in [redacted] custody.[100] Even though it is well established that the Constitution protects a person's liberty interest in their bodily security, the Fourteenth Amendment typically "does not impose a duty on [the state] to protect individuals from third parties," including violence inflicted by a private actor.[101] It also does not guarantee certain minimal levels of safety and security.[102] Instead, "the general rule is that [a] state is not liable for its omissions" such as a failure to act to protect a life, liberty, or property interest since the Fourteenth Amendment does not "transform every tort committed by a state actor into a constitutional violation."[103] Thus, a state's failure to protect a liberty interest does not violate the Fourteenth Amendment unless one of two exceptions applies: (1) the special relationship exception, or (2) the state-created danger exception.[104] If either exception applies, a state's omission or failure to protect may give rise to a Section 1983 claim.[105]

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[95] *Ammons*, 648 F.3d at 1029.
[96] *O'Connor*, 846 F.2d at 1208.
[97] Jose A. Arriola Vigo et al., *Seclusion or Restraint: APA Resource Document,* AM. PSYCHIATRIC ASS'N (Feb. 2022), https://www.psychiatry.org/news-room/apa-blogs/apa-resource-on-seclusion-or-restraint (finding that seclusion and restraints can only be used in emergency safety situations and only when all lesser restrictive interventions have been attempted).
[98] *Ammons*, 648 F.3d at 1028.
[99] *Id.* at 1030.
[100] *See e.g.*, MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES § 3.09, at 1 (4th ed. 2012) ("[Section] 1983 claimants continue to file large numbers of due process duty to protect claims."). *See also* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 194 (1989) (characterizing the issue as "when, if ever, the failure of a state or local governmental entity or its agents to provide an individual with adequate protective services constitutes a violation of the individual's due process rights").
[101] *Patel*, 648 F.3d at 971 (citing *DeShaney*, 487 U.S. at 196. *See also Romeo*, 457 U.S. at 316–17.
[102] *DeShaney*, 487 U.S. at 202. *See generally* Claire Marie Hagan, *Sheltering Psychiatric Patients from the Deshaney Storm: A Proposed Analysis for Determining Affirmative Duties to Voluntary Patients*, 70 Wash. & Lee L. Rev. 725 (2013) (finding that the Constitution restricts the government from acting, but does not require the government to protect us or to provide services).
[103] Munger v. City of Glasgow Police Dep't, 227 F.3d 1082, 1086 (9th Cir.2000). *See also Patel*, 648 F.3d at 971 (finding that the Fourteenth Amendment "generally does not confer any affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests"); *DeShaney*, 489 U.S. at 196-97 (1989) ("[T]he State cannot be held liable under the [Due Process] Clause for injuries that could have been averted had it chosen to provide them."); Daniels v. Williams, 474 U.S. 327, 332 (1986) ("[The Constitution] does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society.").
[104] Campbell v. State of Washington Dep't of Soc. & Health Servs., 671 F.3d 837, 843 (9th Cir. 2011).
[105] *Patel*, 648 F.3d at 972.

a. Special Relationship Exception

The special relationship exception applies when a state "takes a person into its custody and holds him there against his will."[106] The exception is triggered when a person experiences "incarceration, institutionalization, or other similar restraint of personal liberty."[107] The state's duty to provide constitutional protections, such as substantive due process rights, arises "not from the state's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which [the state] has imposed on his freedom."[108] For a minor child, state custody exists when the state has so restrained the child's liberty that the parents cannot care for the child's basic needs.[109] We are unlikely to succeed in a claim that admission to [redacted] results in state custody for the purposes of substantive due process. [Redacted] is not a state-run facility so it is not necessarily the state taking the person into custody and holding them there.[110] For example, Courts have found that this exception does not apply when a child is in private custody, such as their parents, or when they are at school since "the parents—not the state—remain the student's primary caretakers."[111] Additionally, "mere custody… will not support a 'special relationship' claim when a 'person voluntarily resides in a state facility under its custodial rules.'"[112] Since some of the children are voluntarily committed to [redacted] under their parent's consent, they do not fit within this exception.

Another possible approach to finding a special relationship concerns the children in state custody since "it is . . . clearly established that this special relationship doctrine applies to children in foster care."[113] "[O]nce the state assumes wardship of a child, the state owes the child, as part of that person's protected liberty interest, reasonable safety and minimally adequate care and treatment appropriate to the age and circumstances of the child."[114] This liberty interest includes "protection from harm inflicted by a foster parent."[115] The proper standard for determining whether a foster child's due process rights have been violated is "deliberate indifference," which "requires (1) a showing of an objectively substantial risk of harm; and (2) a showing that the officials were subjectively aware of facts from which an inference could be drawn that a substantial risk of serious harm existed and (a) the official actually drew that inference or (b) that a reasonable official would have been compelled to draw that inference."[116] We could argue that, since the state had a custodial relationship with foster children, they failed to provide adequate safety and medical care when they affirmatively endangered some of the children by putting them at [redacted], which was known to be dangerous. Overall, we might have enough evidence to show there was a special relationship, but it may be difficult to show deliberate indifference sufficient to find liability.

b. State-created Danger Exception

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[106] *DeShaney*, 489 U.S. at 199–200.
[107] *Id.* at 200.
[108] *Id. See also Patel*, 648 F.3d at 972 ("In other words, the person's substantive due process rights are triggered when the state restrains his liberty, not when he suffers harm caused by the actions of third parties.").
[109] *DeShaney*, 489 U.S. at 199-201.
[110] *Id.* at 199–200.
[111] *DeShaney*, 489 U.S. at 201; *Patel*, 648 F.3d at 973.
[112] *Campbell*, 671 F.3d at 843 (citing Walton v. Alexander, 44 F.3d 1297, 1305 (5th Cir. 1995)).
[113] Henry A. v. Willden, 678 F.3d 991, 1000 (9th Cir. 2012). *See also DeShaney*, 489 U.S. at 201 n.9 (implying that if the plaintiff had been placed in foster care, the Court may have ruled differently and found a special relationship).
[114] Lipscomb v. Simmons, 962 F.2d 1374, 1379 (9th Cir. 1992). *See also* Tamas v. Dep't of Soc. & Health Servs., 630 F.3d 833, 846–47 (9th Cir. 2010) (finding that foster children retain "a federal constitutional right to state protection" while they remain in the care of the State).
[115] *Tamas*, 630 F.3d at 842.
[116] *Id.* at 844-845.

The state can also be held liable under the Fourteenth Amendment's Due Process Clause for failing to protect an individual from harm by third parties under the "state-created danger exception." This applies only where there is "affirmative conduct on the part of the state in placing the plaintiff in danger," that they would not have faced otherwise and "where the state acts with 'deliberate indifference' to a 'known or obvious danger.'"[117] "Deliberate indifference is 'a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action."[118] To satisfy the culpable mental state, the state actor must "recognize [an] unreasonable risk and actually intend to expose the plaintiff to such risks without regard to the consequences to the plaintiff."[119] The Ninth Circuit held that a claim could proceed against a state actor for sending a child to an "out-of-state facility that had a known history of chronic neglect and abuse."[120] In that case, the plaintiff claimed that the state acted with deliberate indifference to known or obvious danger by removing the children from their homes and placing them in the care of foster parents, including in the care of out-of-state facilities, that were unfit to care for them and posed an imminent risk of harm to plaintiffs' safety.[121] In another case, the Ninth Circuit found that a state's approval of a foster care placement, despite reports of suspected abuse, created a danger of abuse that the foster child would not otherwise have faced.[122] From this case law, we could likely bring a claim where foster children allege that the state officials knew of the danger of abuse at [redacted] and acted with deliberate indifference by placing them there anyway. There is likely enough evidence to support a Section 1983 due process claim against the state officials under the state-created danger doctrine.

There is evidence that the state should have been aware of the dangers of sending foster care children to [redacted]. Federal, state and nonprofit regulators have regularly found problems with the facility. Federal investigators with the Centers for Medicare and Medicaid Services documented problems at the hospital, including "immediate jeopardy" situations that put the health and safety of patients at risk.[123] The State Division of Behavioral Health reported concerns from staff regarding understaffing, documented incomplete and conflicting medical notes, and urged [redacted] to "hire additional staff to ensure services are being rendered safely and with quality of care."[124] The state found that it would be "of the utmost importance" for the hospital to hire, train, and retain more workers.[125] Finally, the nonprofit safety and quality accrediting organization the Joint Commission handed down a "preliminary denial of accreditation" to [redacted] citing conditions that posed a "threat to patients."[126] The Commission named 12 different areas where inspectors found "performance issues" at [redacted], including that "the patient has the right to be free from neglect; exploitation; and verbal, mental, physical, and sexual abuse" and "the hospital provides care, treatment, services, and an environment that pose no risk of an 'Immediate Threat to Health or Safety.'"[127] This evidence could be sufficient to claim that the state exhibited deliberate indifference and violated the children's rights to "receive adequate medical care, monitor the administration of medication, or respond to reports of abuse."[128] The question concerning deliberate indifference is fact-specific, dependent on the circumstances of our plaintiffs and how much the state employees were aware of what the foster care children might face at [redacted].

4. Remedies and Statute of Limitations

[117] *Patel*, 648 F.3d at 974 (quoting *Munger*, 227 F.3d at 1086). *See also* L.W. v. Grubbs, 92 F.3d 894, 900 (9th Cir. 1996).
[118] *Id.* (quoting Bd. of Cnty. Cmm'rs v. Brown, 520 U.S. 397, 410 (1997)).
[119] *Grubbs*, 92 F.3d at 899.
[120] *Henry A.*, 678 F.3d at 1002.
[121] *Id.*
[122] *Tamas*, 630 F.3d at 843–44.
[123] [Redacted].
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Henry A.*, 678 F.3d at 1001.

Under Section 1983, plaintiffs can seek injunctive relief and damages. In similar litigation, a district court entered a permanent injunction that enjoined four practices at a private psychiatric residential treatment center, including prohibiting the defendants from: "(1) opening, reading, monitoring or censoring the boys' mail; (2) administering polygraph examinations for any purpose whatsoever; (3) placing boys in isolation facilities for any reason other than to contain a boy who is physically violent; and (4) using physical force for any purpose other than to restrain a juvenile who is either physically violent and immediately dangerous to himself or others, or physically resisting institutional rules."[129] Plaintiffs may also recover compensatory damages, including for physical pain and suffering, as well as emotional distress.[130] The Supreme Court found that compensatory damages for a constitutional violation under Section 1983 must be based on proof of the actual injuries suffered by the plaintiff.[131] When a Section 1983 plaintiff suffers a violation of constitutional rights, but no actual injuries, they are entitled to an award of only $1 in nominal damages.[132] A Section 1983 plaintiff may recover punitive damages against an official in their personal capacity if the official acted with malicious or evil intent or in callous disregard of the plaintiff's federally protected rights.[133] Punitive damages may be awarded even when the plaintiff recovers only nominal damages.[134] Finally, courts can award reasonable attorneys' fees to the prevailing party in a Section 1983 action.[135]

Finally, there is no federal statute of limitations for Section 1983 claims.[136] When federal law is silent on an issue in a federal Section 1983 action, 42 U.S .C. § 1988(a) requires federal courts to borrow a state's limitations period.[137] In Wilson v. Garcia, the Supreme Court held that the federal court should borrow the state's limitations period for personal injury actions.[138] In the state, this period is two years.[139]

III. Conclusion

As the memo above demonstrates, all potential legal claims will necessitate additional fact gathering. Based on our legal analysis, we believe that the Medicaid, ADA/Rehab, and the False Claims Act present the strongest claims, dependent on facts. Substantive due process is viable but requires finding state action.

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[129] *Milonas*, 691 F.2d at 940.
[130] *Carey*, 435 U.S. at 267; *Stachura*, 453 U.S. at 308 n.11.
[131] *Id.*
[132] *Id.*
[133] Smith v. Wade, 461 U.S. 30 (1983).
[134] *See, e.g.*, Cortes-Reyes v. Salas-Quintana, 608 F.3d 41, 53 (1st Cir. 2010) (finding "jury may properly award punitive damages even if it awards no nominal or compensatory damages").
[135] Maine v. Thiboutot, 448 U.S. 1, 11 (1980). *See also* Hudson v. Michigan, 547 U.S. 586, 597 (2006) ("Since some civil-rights violations would yield damages too small to justify the expense of litigation, Congress has authorized attorney's fees for civil-rights plaintiffs.").
[136] MARTIN A. SCHWARTZ & KATHRYN R. URBONY, FED. JUDICIAL CTR., SECTION 1983 LITIGATION 5 (3d ed. 2008).
[137] *Id.*
[138] Wilson v. Garcia, 471 U.S. 261 (1985).
[139] [Redacted].

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Contact Phone Number	**332-256-3384**

Applicant Education

BA/BS From	**University of Dayton**
Date of BA/BS	**May 2020**
JD/LLB From	**Fordham University School of Law** **https://www.fordham.edu/info/29081/center_for_judicial_engagement_and_clerkships**
Date of JD/LLB	**May 22, 2023**
Class Rank	**Below 50%**
Law Review/ Journal	**Yes**
Journal(s)	**Fordham Journal of Corporate & Financial Law**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Professional Organization

Organizations	**Just the Beginning Organization**

Recommenders

Martin, Michael
mwmartin@fordham.edu
Nicholas, Haddad
haddadnw@gmail.com
Gentile, Caroline
CGENTILE@law.fordham.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Jamel Gross-Cassel
203 West 85th Street Apt. 56
New York, NY 10024

June 13, 2023

The Honorable Jamar K. Walker
United States District Court
for the Eastern District of Virginia
600 Granby Street
Norfolk, VA 23510-1915

Re: Clerkship Application of Jamel Gross-Cassel

Dear Judge Walker:

I am a 2023 graduate of Fordham University School of Law, where I served as the Editor-in-Chief of the *Fordham Journal of Corporate & Financial Law* and was awarded the Parchomovsky-Siegelman Student Graduation Prize for publishing the best work of scholarship. I am applying for a clerkship in your Chambers for the 2024-2025 term and am flexible as to a starting date.

Leading a law journal, writing a Note, and learning from some of the best litigators in the country are all things I could never have imagined when I was homeless and estranged from my parents a few years ago. Becoming a law clerk is the next step in continuing such an unimaginable trajectory and establishing myself as a capable and eager-to-grow legal mind.

My long-term goal is to be an attorney at the Federal Defenders of New York. My internship at the Federal Defenders in Fall 2022 ignited a passion for helping people who are charged with federal crimes and cannot afford to hire an attorney. My own hardships, before and during law school, allowed me to form relationships with my clients and relate to them in an authentic way. Recognizing myself in some of them also enriched my perspective on the law and now I want to refine my skills as a clerk in your chambers.

Like many law students who lack proper mentors, family support, and financial wherewithal, the first year of law school challenged me and required painful adjustments. Fortunately, a paid internship mitigated my financial hardships and allowed me to focus solely on law school. Since then, I maintained a 3.47 GPA while spending each semester in a litigation-focused internship. My Note, "The Solution to Shadow Trading Is Not Found in Current Insider Trading Law: A Proposed Amendment to Rule 10b5-2," and my editorial position demonstrate my growth as a legal writer. I have also competed in multiple trial advocacy competitions and learned from extraordinary practitioners during my internships with the Federal Defenders and Kaplan Hecker & Fink.

Attached, please find my resume, unofficial law school transcript, and writing samples. Letters of recommendation from Caroline M. Gentile (cgentile@law.fordham.edu), Michael W. Martin (mwmartin@fordham.edu), and Nicholas W. Haddad (haddadnw@gmail.com) will be sent under separate cover. I greatly appreciate your kind consideration.

Sincerely,

Jamel Gross-Cassel

Enclosures

JAMEL GROSS-CASSEL
203 West 85th Street Apt. 56 New York, New York 10024 • (332) 256-3384 • jgrosscassel@fordham.edu

EDUCATION:

Fordham University School of Law, New York, NY
Juris Doctor, May 2023

Honors/ Activities: Editor-in-Chief, Journal of Corporate & Financial Law
Parchomovsky-Siegelman Student Graduation Prize (best work of scholarship published in one of Fordham Law School's journals)
Archibald R. Murray Public Service Award
Brendan Moore Trial Advocacy Team
Black Law Students Association (Student of the year 2022-23)

Publications: Jamel Gross-Cassel, Note, *The Solution to Shadow Trading Is Not Found in Current Insider Trading Law: A Proposed Amendment to Rule 10b5-2*, 28 FORDHAM J. CORP. & FIN. L. 439 (2023).

University of Dayton, Dayton, OH
Bachelor of Arts, Political Science, May 2020
Honors: Mock Trial Team (Competitor, Indy Mock Hundred 2019 – Outstanding Attorney)

EXPERIENCE:

Hon. George B. Daniels, U.S. District Court for the S.D.N.Y. New York, NY
Legal Extern Spring 2023

- Assisted with drafting opinions and decisions on matters including compassionate release, fraudulent conveyance, deliberate indifference, and attorney's fees, in addition to attending various court proceedings.

The Federal Defenders of New York (S.D.N.Y.) New York, NY
Legal Extern Fall 2022

- Conducted legal research and drafted memoranda on issues including wire fraud, narcotics importation conspiracy, possession of a weapon, and fourth amendment rights.
- Assisted attorneys with arraignments, client interviews, client counseling, discovery, and preparation for bail arguments.

Smith Gambrell & Russell LLP New York, NY
***Summer Associate* (permanent offer accepted)** Summer 2022

- Drafted documents including a motion in response to an objection of a Magistrate Judge's ruling on discovery and attended depositions on the matter.
- Conducted research and drafted subsequent memoranda on topics including class-action standing, data breaches, quantum meruit, and landlord-tenant law.

Kaplan Hecker & Fink LLP New York, NY
Legal Intern September 2021 – April 2022

- Conducted review of documents pursuant to discovery requests to ascertain necessity for responsiveness and characterization of privileged and drafted responses to subpoenas.
- Assisted with criminal and pro bono matters including client intake, research, and drafting memoranda on topics such as illegal search and seizure and harsh and excessive sentencing.

Lincoln Square Legal Services, Inc. New York, NY
Federal Litigation Clinic Research Assistant Summer 2021

- Assisted, as a team member, with preparation of court proceedings including legal research, drafting court filings, and categorizing evidence.

Advocates for Basic Legal Equality, Inc. Dayton, OH
Intern Fall 2019

- Assisted at a non-profit regional law firm that provides legal assistance in civil matters to help low-income individuals and groups in Ohio.

INTERESTS: Running, Chess, Dayton Basketball, and the Philadelphia Eagles.

Jamel Gross-Cassel
Fordham University School of Law
Cumulative G.P.A.: 3.152

Fall 2020:

Course Name	Instructor	Grade	Credit Units	Comments
Criminal Law	John Pfaff	B-	3	
Civil Procedure	Pamela Bookman	B-	5	
Legal Writing/Research	Nicholas Haddad	IP	2	
Legal Process and Quantitative Methods	Various	P	1	
Torts	Courtney Cox	B-	4	

Fall 2020 G.P.A.: 2.667

Spring 2021:

Course Name	Instructor	Grade	Credit Units	Comments
Contracts	Steven Thel	B	4	
Constitutional Law	Martin Flaherty	B-	4	
Legal Writing and Research	Nicholas Haddad	B	3	
Legislation and Regulation	Clare Huntington	B	4	
Property	Zephyr Teachout	B-	4	

Spring 2021 G.P.A.: 2.860

Fall 2021:

Course Name	Instructor	Grade	Credit Units	Comments
Employment Discrimination	Lisa Teich	A-	3	
Organized Crime	Eric Seidel	B+	2	
Alternative Dispute Resolution	Jacqueline NolanHaley	B+	2	
Fundamental lawyering Skills	Anna Clark	A-	3	
Professional Responsibility	James Andrew Kent	B	3	

Fall 2021 G.P.A.: 3.410

Jamel Gross-Cassel
Fordham University School of Law
Cumulative G.P.A.: 3.152

Spring 2022:

Course Name	Instructor	Grade	Credit Units	Comments
Corporations	Caroline Gentile	B+	4	
E-Law in the Global Setting	Kenneth Rashbaum	A	2	
Regulation of Financial Institutions	Steven Thel	B+	3	
Negotiations	Deborah Shapiro	B+	2	
Trial Competition Teams	N/A	P	3	

Spring 2022 G.P.A.: 3.454

Fall 2022

Course Name	Instructor	Grade	Credit Units	Comments
How Judges Decide	Joel Cohen, Richard Emery, Dale Degenshein	A-	2	
Peer Mentoring and Leadership	Jordana Confino	B+	2	
Externship Seminar	Nicole Lodge	A-	1	
Externship Fieldwork	N/A	P	3	Federal Defenders of New York (SDNY)

Fall 2022 G.P.A.: 3.533

Spring 2023:

Course Name	Instructor	Grade	Credit Units	Comments
Evidence	Bennett Capers	B+	4	
Advanced Legal Writing	Arnold Cohen	A-	3	
Externship Seminar	Hon. Sherry Klein Heitler (Ret.)	A-	1	
Externship Fieldwork	N/A	P	3	Judicial extern to the Hon. George B. Daniels

Spring 2023 G.P.A.: 3.50

FORDHAM UNIVERSITY SCHOOL OF LAW
EXPLANATION OF TRANSCRIPT

Grade Scale for the Juris Doctor (J.D.)

Effective Fall 2014		Prior to Fall 2014	
Grade	**Quality Points**	**Grade**	**Quality Points**
A+	4.333	A+	4.30
A	4.000	A	4.00
A-	3.667	A-	3.70
B+	3.333	B+	3.30
B	3.000	B	3.00
B-	2.667	B-	2.70
C+	2.333	C+	2.30
C	2.000	C	2.00
C-	1.667	C-	1.70
D	1.000	D	1.00
F	0.000	F	0.00
P	Not in GPA	P	Not in GPA
S	Not in GPA	S	Not in GPA

Class Ranking - The Law School does not calculate class rankings.

Transfer Credit - Transfer credit (ex. TA, TB, etc.) represents work applicable to the current curriculum and must be a minimum of a "C" grade to be accepted. Transfer credit is not included in the weighted grade point average.

Repeating Courses - Only a course with a failed grade may be repeated. Failed required courses must be repeated. Failed elective courses may be repeated, however this is not required. If repeated, the quality points of the new grade will be half in value (ex. F/A would be 2.00 quality points). The original failing grade remains on the transcript.

Grade Scale for Master of Laws (LL.M.) and Master of Studies in Law (M.S.L.)

Effective Fall 2017	
Grade	**Quality Points**
H+	4.2
H	4.0
H-	3.8
VG+	3.6
VG	3.4
VG-	3.2
G+	3.0
G	2.8
G-	2.6
P+	2.4
P	2.2
P-	2.0
F	0.0

Prior to Fall 2017	
Grade	**Description**
H (Honors)	Outstanding performance
VG (Very Good)	Excellent performance
G (Good)	Above average performance
P (Pass)	Performance worthy of credit
F (Fail)	Inferior performance that does not satisfy the minimum standard for course credit

Effective Fall 2014 within each grade level (H, VG, G, P), students may be awarded a plus (+) or minus (-) to distinguish performance on the high end or the low end within the grade level.

Grade Scale for Legal Writing and Introduction to U.S. Legal System Courses

(These grades are not factored into honors determinations)

Students Admitted Prior to Fall 2017

Grade	Description
HP (High Pass)	Outstanding
PA (Pass)	Good or Acceptable
LP (Low Pass)	Passing, but deficient performance
FA (Fail)	Performance unworthy of credit

Students Admitted Prior to Fall 2011

Grade	Description
H (Honors)	Outstanding
CR (Credit)	Good or Acceptable
F (Fail)	Performance unworthy of credit

Grade Scale for Doctor of Juridical Science (S.J.D.)

Grade	Description
CR	Credit
NR	No Credit

Administrative Grades that May be Used in J.D., LL.M., and M.S.L Programs

AUD (Auditing)
CR (Credit)
INC (Incomplete)
IP (In Progress: year long course, final grade assigned in succeeding term)
NC (No Credit)
NGR (No Grade Received)
S (Satisfactory)
U (Unsatisfactory)
W (Withdrew)

Student education records on reserve are maintained in accordance with Public Law 93-380, sec 438, "The Family Education Rights & Privacy Act" (FERPA).The policy of Fordham University pertinent to this legislation is available from the Registrar upon request.

Fordham University School of Law
150 West 62nd Street
New York, NY 10023

June 13, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am grateful to have the opportunity to write on behalf of Jamel Gross-Cassel for a judicial clerkship. Like few have, Jamel inspires me. It was miraculous that Jamel found his way to the University of Dayton in the late summer of 2016 at a time when he was homeless, abandoned by family, and on a razor's edge of becoming another statistic. Seven years later, on the verge of graduating from Fordham Law School as the Editor-in-Chief of its Journal of Corporate and Financial Law, a member of the Trial Advocacy Team, and with an offer from Smith Gambrell & Russell, Jamel's journey is the American Dream. Jamel is an obviously bright and exceptional student. To meet him is to experience a quiet strength and deep belief that he will exceed expectations by sheer will and work ethic. Jamel is truly one of a kind and would be a wonderful addition to your Chambers.

As one of my three legal interns in the summer of 2021, Jamel helped to manage the Fed Lit Clinic's caseload, which typically is handled by 12-14 students during the school year. The caseload consisted of federal criminal defense cases with an array of federal civil matters, such as prisoner civil rights, police misconduct, and employment discrimination matters. Jamel worked on an array of tasks, including drafting emails to prosecutors, letters to the Court, conducting legal research, reviewing discovery in the civil matters, and counseling clients, most of whom were incarcerated. He helped to decipher difficult factual records, researched touch questions of law, and assisted in the counseling of clients on their matters. The cases exposed him to the nuances of federal discovery, plea bargaining, sentencing, critical constitutional and federal court issues, and complex counseling involving life-changing consequences. He handled all of these tasks deftly.

Jamel's success as a research assistant was founded on skills essential for clerking. He was an active, critical thinker whose comments were often insightful and reflected scholarly ambition. He worked hard and efficiently with great focus, while exhibiting sound judgment throughout his time with me. He wrote clearly and concisely, and his writing proficiency has only grown since his time with me. He was a pleasure to supervise.

Most importantly, Jamel is friendly, engaging and compassionate. He lifts every room he enters with a positive energy few have. Hardworking, he worked 20 hours per week through undergrad, reflecting his discipline. He is a reliable and valued colleague, as last year's Journal editors discovered when they voted him to be this year's Editor-in-Chief. He has met the rigors of a top law graduate program, excelling under trying conditions and still maintaining his wonderful and humble demeanor. I expect that he will similarly flourish as your law clerk, and thus recommend him to you without reservation. I welcome any further inquiry that you may have regarding him.

Sincerely,

Michael W. Martin
Associate Dean for Experiential Learning,
Director of Clinical Programs, and
Clinical Professor of Law

Michael Martin - mwmartin@fordham.edu

Fordham University School of Law
150 West 62nd Street
New York, NY 10023

June 13, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write in enthusiastic support of Jamel Gross-Cassel's application to serve as your law clerk.

It was my great fortune to have Jamel as a student in my first-year legal writing class at Fordham. During my ten years of teaching, I have never written a letter in support of a student who, like Jamel, received a B in my class. But I also have never had a student as extraordinary as Jamel. Jamel possesses a wonderful and rare combination of keen intelligence, maturity, humility, and exceedingly good judgment. I recommend him without reservation.

Beginning with our first class, Jamel consistently demonstrated an unerring sense of what clerking requires—an impressive ability to spot issues, to cut through the thicket, and to analyze issues with precision. His prose is crisp, direct, and engaging, and it has been a joy to watch him refine his writing over time. Jamel's writing samples (including his forthcoming Note) are a testament to his dedication and focus on honing his craft.

In class, Jamel enriched our discussions with searching comments and questions, often playing a pivotal role in driving class discussion—a particularly impressive feat given that I conducted our class virtually that year. He also is a superb speaker. During oral argument, he demonstrated tremendous poise, answering questions clearly and directly. It therefore was hardly surprising that Jamel went on to be an accomplished member of the Brendan Moore Trial Advocacy Team and Editor-in-Chief of the Fordham Journal of Corporate & Financial Law.

And more, Jamel truly distinguished himself from his peers by taking a genuine interest in the subjects about which he wrote. Although the course material consisted of hypotheticals, Jamel never approached the problems as "assignments." Instead, he owned his work by mastering the underlying facts and presenting a just legal result under the provided circumstances.

Aside from his stellar writing and analytical skills, Jamel is a team player extraordinaire. Among the young professionals with whom I have worked, Jamel not only stands out as one of the brightest, but also for his integrity and judgment, eagerness to solve even the most challenging problems, and respect for those around him.

At the beginning of his 1L year, Jamel wrote me a short message, asking that he not be defined by his past experiences, but instead by his abilities. I am not alone is recognizing how extraordinary those abilities are—as demonstrated by his impressive roster of roles with Judge Daniels, the Federal Defenders, and top firms. I hope that roster will soon expand to include a judicial clerkship.

As a former Court of Appeals and District Court law clerk, I know how much chambers needs a steadfast, efficient, and talented team. I have no doubt that Jamel will be an outstanding law clerk—insightful, productive, a team-player, and a joy to have in your Chambers.

I would love to speak with you more about Jamel. Please do not hesitate to contact me at (917) 755-0087.

Respectfully yours,

Nicholas W. Haddad

Fordham University School of Law
150 West 62nd Street
New York, NY 10023

June 13, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am delighted to recommend Jamel Gross-Cassel to serve as a law clerk in your chambers. He is among the most diligent, and the most disciplined, students I have had the privilege to teach in the twenty years I have been a member of the faculty at the Fordham University School of Law. He is also much more willing, and able, to learn from constructive criticism than not only most students I have taught but also most academicians and practitioners with whom I have worked. As a result, despite being a first-generation student estranged from his family for many years, during his time at Fordham's Law School, Jamel has become an outstanding student, a (soon-to-be) published author, and a leader among his peers. At the same time, he has gained valuable practical experience through internships at the litigation boutique Kaplan Hecker & Fink LLP, the Federal Defenders of New York, and the Honorable George B. Daniels of the United States District Court for the Southern District of New York. In the Fall of 2023, he will join Smith, Gambrell & Russell, LLP as a litigation associate.

Almost immediately upon gaining admission to the Fordham Journal of Corporate & Financial Law in July of 2021 (after his first year of law school), Jamel contacted me (even though we had never met), because I am one of the journal's co-moderators and he was interested in writing a student note. I advised him (as I do all rising second-year students) to wait until he had taken Corporations so that he would have a sufficient background in business law to be able to choose a topic that truly interests him. Although he was clearly disappointed to delay his plans, he agreed my advice was sound.

Six months later, I was surprised as I walked into the classroom on the first day of classes for the Spring 2022 Semester (the second semester of his second year of law school), to see Jamel already sitting in the second row of seats, because the seats in the first few rows tend to be the last ones to be taken. At the end of the class meeting, I was stunned when Jamel approached me, reminded me of our earlier conversation, and told me that he was very excited to take Corporations so he could both learn about business law and identify a topic for his student note, because many students are unwilling to undertake the work necessary to write a note in their third year of law school.

With more than one hundred students, our class in Corporations was quite large. The considerable size of the class always tends to diminish students' willingness to participate in classroom discussions. In addition, I have found that, having begun their legal studies in virtual classrooms due to the coronavirus pandemic, students in Jamel's cohort are notably more reluctant to volunteer answers to questions than students who entered law school with classes taught in the building (both those in cohorts beginning their studies before the pandemic and those in the cohort beginning their studies after it). Jamel was not only always prepared for our class meetings, he was also one of only a handful of students who frequently volunteered to participate in our classroom discussions. His contributions reflected an understanding of the cases and doctrines (and statutes) we explored as well as an ability to grasp the underlying (and generally unstated) rationale for the actions taken by participants in transactions and the decisions made by judges in courtrooms.

Approximately six weeks into the semester, Jamel asked me to recommend ways for him to ensure that he was studying the course material effectively. I advised him (as I do all my students) to use the examinations I have previously given in Corporations (all of which I make available to students on a course web page) as practice problems. As they are all essay exams, I also told him (as I do all my students) that I would be happy to discuss his answers to the questions on the old exams. Finally, I encouraged him (as I do all my students) to begin this work during the semester, rather than waiting until the examination period. In all the years I have been teaching, Jamel is the first student who has asked to meet with me to discuss answers to questions on old exams before the end of the semester. At his request, we met during both Spring Break (once at the beginning of it and once at the end of it) and Easter Break as well as several times while classes were in session. For each of these meetings, Jamel prepared detailed outlines to several questions on the old exams, and during all of them he asked thoughtful questions about the gaps I identified in his understanding of the cases and doctrines (and statutes) we had covered without becoming dismayed by his mistakes or discouraged from continuing to improve his understanding of the course material.

Immediately after grades for Corporations were made available to the students enrolled in the course in June of 2022, Jamel sent me an email message identifying three possible topics for his student note, because, although the independent study project through which he would receive academic credit for work on his note would not begin until August of 2022 (at the start of his third year of law school), he wanted to begin his research before classes resumed (and while he was working as a summer associate at Smith, Gambrell & Russell, LLP). In response, I described the advantages and disadvantages of each of the topics he was considering. I was excited when he chose the most ambitious of them; whether shadow trading – when an insider uses material nonpublic information about the insider's company to trade in the shares of another company (for example, a competitor) – should be banned as a species of insider trading.

Caroline Gentile - CGENTILE@law.fordham.edu

As I had by this time come to expect from him, when we met at the start of the Fall 2022 Semester to discuss his student note, Jamel had already completed a substantial amount of research. More importantly, he had already grasped that, were shadow trading to be included within the prohibitions against insider trading, the most promising avenues for inclusion were an extension of misappropriation theory (as adopted by the Supreme Court in United States v. O'Hagan) or an amendment of Rule 10b5-2 (under the Securities Exchange Act of 1934), rather than an application of classical theory (as adopted by the Supreme Court in Chiarella v. United States). At the end of this meeting, I offered (as I do for every student whose independent study project I supervise) to meet with him once each week. In all the years I have been teaching, Jamel is the only student who did not cancel (or ask to reschedule) a single meeting. Moreover, the day before each of our weekly meetings he provided me with a document evincing the work he had said he would accomplish during that week – for example, a summary of the research he had conducted, an outline of his note, a detailed outline of the particular part of the note he planned to draft, or a draft of part of the note. And, during each of these meetings, he had both a series of thoughtful questions for me and suggestions for the tasks to be undertaken in the coming week.
Unlike many students who begin their notes with the conclusion in mind and so evaluate every case, statute, regulation, and secondary source they read as part of their research in terms of whether it supports their recommendation, Jamel viewed his note as an opportunity to understand, and to offer suggestions for improving, insider trading law. Consequently, unlike many students who conclude their notes by endorsing an argument they encountered in their research, Jamel offers a novel, and pragmatic, amendment to Rule 10b5-2 that captures (only) instances of shadow trading that fall within the rule's stated reasons for prohibiting insider trading; protecting investors and the fairness and integrity of the securities markets against improper trading on the basis of inside information. To test the implications, and likely success, of his proposal, Jamel develops three scenarios involving shadow trading to which he first applies the existing prohibitions against insider trading and then applies his proposed amendment to Rule 10b5-2.

Jamel's note, which is entitled The Solution to Shadow Trading Is Not Found in Current Insider Trading Law: A Proposed Amendment to Rule 10b5-2, is thoroughly researched, skillfully argued, and clearly written. It has been accepted for publication in the Fordham Journal of Corporate & Financial Law, which is ranked among the top ten specialty journals for business, corporations, and securities law and among the top five journals for banking, finance, and insurance law. As a further testament to his outstanding work, I plan to nominate Jamel's note for the Parchomovsky-Siegelman Student Graduation Prize, which is awarded to a member of the graduating class who produced the best work of scholarship published in one of our student-edited journals or reviews.

In addition to his academic pursuits (and his internships), Jamel is the Editor-in-Chief of the Fordham Journal of Corporate & Financial Law (for which I serve as one of the co-moderators0. He is the first Black person to serve in this role since the journal's founding in 1996 (nearly thirty years ago). Throughout his tenure, he has worked closely with the other members of the Editorial Board to ensure the journal's continued success by selecting for publication important articles, essays, notes, and comments on interesting topics, organizing a symposium dedicated to antitrust concerns about big tech, and amending its foundational documents to clarify the responsibilities assigned to several board positions. I have been especially impressed with his skill in managing challenging situations with an authors, in guiding fellow board members through difficult conversations, and in encouraging staffers (second-year students) to become involved in, and to feel comfortable participating in, the activities the journal sponsors.

In summary, I have had an opportunity to evaluate Jamel in a variety of settings. I am confident that his exceptional drive, his capacity for legal analysis, and his extraordinary leadership skills will allow him to contribute to, and to succeed in, your chambers. Moreover, I expect that you will, as I have, very much enjoy working with, and mentoring, him.

Please phone me (or send me an email message) if you have any questions or if you require any additional information. I look forward to speaking with you.

Thank you very much for your attention.

Very truly yours,

Caroline M. Gentile

Caroline Gentile - CGENTILE@law.fordham.edu

Jamel Gross-Cassel
203 West 85th Street #56 New York, NY 10024 | (332) 256-3384 | Jgrosscassel@fordham.edu

WRITING SAMPLE:

Attached is an excerpt from my Note, The Solution to Shadow Trading Is Not Found in Current Insider Trading Law: A Proposed Amendment to Rule 10b5-2, in the *Fordham Journal of Corporate & Financial Law*. I have removed the title page, introduction, and background section for brevity.

The Note focuses on the novel "shadow trading" theory currently litigated in *SEC v. Panuwat*. Shadow trading occurs when a corporate insider trades on material, nonpublic information by buying a competitor or closely related company's stock. The unique and novel element of shadow trading is the lack of fiduciary duty to shareholders and the involvement of a third part company. In a shadow trade, the securities purchased are not that of the company for which the corporate insider works or the company typically completing a deal with the insider's company.

The included sections of the Note focus on three things. First, the reader is given examples of shadow trades that regularly occur. These examples are then applied to the current theories of insider trading law to demonstrate how shadow trading is not yet illegal. Second, the Note then highlights why a rule change is needed to prohibit shadow trading and proposes the exact amendment to Rule 10b5-2. Last, the amended rule is applied to the same scenarios mentioned earlier to demonstrate how the amendment effectively prohibits shadow trading.

For background on *SEC v. Panuwat*, Panuwat was a senior director of business development during his time at Medivation. While in that position, Panuwat received an email from the CEO of Medivation informing him that an acquisition of Medivation by Pfizer was imminent pending final details. The SEC alleged that Panuwat was informed through his work with investment bankers that Incyte, another biopharmaceutical company, was similar to Medivation. Having never traded Incyte stock before, Panuwat purchased 578 Incyte call options at prices of $80, $82.50, and $85 per share within minutes of receiving the email of the looming acquisition. Several days after purchasing the options, Medivation publicly announced that Pfizer would acquire them. As a result of the announcement, and the similarity of Medivation and Incyte, the following Monday, Incyte's stock reached a high of $84.39 and closed around eight percent higher than its closing price the previous Friday. The spike in Incyte's stock price earned Panuwat $107,066 in profit on the options he purchased.

inherits a loss or misses out on a gain they could not have foreseen.[85] This "informational advantage that the public is unable lawfully to overcome or offset" is what securities laws seek to preclude.[86] It follows logically that an investor who misjudges the market may try again, but an investor who finds out they were on the wrong end of an insider trade will withdraw from the market to avoid being a repeat victim.

Insider trading harms not only individual victims, but also the broader securities market.[87] Therefore, the reasoning for regulating insider trading is often rooted in the protection of the market. The Supreme Court stated that common law doctrines against insider trading were designed to protect the integrity of the securities market.[88] Without these protections, the public would be discouraged from trading in the securities market.[89] If the public still trades, the integrity of prices becomes an issue and a justification for insider trading regulations.[90] For example, one theory is that if the public thinks they are trading with someone with insider information, they will demand a premium on any trade due to a market overrun with insider trading.[91] Thus, the prices of securities would not reflect their value or all available information as intended.

II. ANALYZING HOW SHADOW TRADERS ESCAPE LIABILITY UNDER CURRENT LAW

The issue this Note seeks to remedy is how shadow trading, through a loophole, evades the existing law prohibiting insider trading. Much like in *Chiarella*,[92] the lack of a fiduciary relationship to shareholders in shadow trading frees a trader from the duty to disclose. For example, this

85. *Id.*

86. Victor Brudney, *Insiders, Outsiders, and Informational Advantages Under the Federal Securities Laws*, 93 HARV. L. REV. 322, 360 (1979).

87. *See* Michael A. Perino, *The Lost History of Insider Trading*, 2019 U. ILL. L. REV. 951, 953–54 (2019).

88. United States v. O'Hagan, 521 U.S. 642, 653 (1997).

89. *See id.* at 658.

90. *See* Steve Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 STAN. L. REV. 385, 392 (1990) (arguing the fundamental purpose of the Securities Exchange Act is to protect the public interest in the integrity of the prices of securities and a plain reading of Section 10(b) gives the SEC authority to regulate any practice that defeats it).

91. Alexandre Padilla, *Should the Government Regulate Insider Trading?*, 22 J. LIBERTARIAN STUD. 379, 382-83 (2011).

92. *See generally* Chiarella v. United States, 445 U.S. 222 (1980).

loophole in the law would also be present in instances where an insider purchases stock in their company's supplier before a new product announcement, knowing that the supplier's stock will increase after the announcement has been made. While the insider would owe a duty to disclose to their own company, they would not owe a duty to the supplier, and yet they are left with material, nonpublic information of extreme value far before the public would have a chance to benefit.

In *Panuwat*, a key piece of information in the SEC's allegations and pursuit of shadow trading is that Panuwat signed a company policy prohibiting him from using material, nonpublic information learned through his job to trade Medivation securities "or the securities of another publicly traded company, including all significant collaborators, customers, partners, suppliers, or competitors of the Company."[93] This policy established the duty to the source of the information required under the misappropriation theory.[94] Because Panuwat signed the policy, he opened the door for the SEC to argue that he owed the duty to the source of the information—Medivation—not to trade on the nonpublic imminent acquisition of Medivation. This Part addresses the current theory of shadow trading, additional factors and circumstances not considered by current case law, and the inability to prohibit shadow trading with insider trading law. Consider the following hypothetical scenarios of shadow trading.[95]

A. INSTANCES OF SHADOW TRADING

1. Scenario One: Supplier

Company A is a company that produces vaccines for deadly viruses. Suppose that an executive at Company A, due to their position, receives an email from the CEO that a breakthrough has been made on a vaccine that has been deemed safe for human use and millions of doses will now be produced. This executive then takes that material, nonpublic information and purchases stock in Company B, which supplies needles

93. SEC v. Panuwat, No. 21-CV-06322, 2022 WL 633306, at *1 (N.D. Cal. Jan. 14, 2022).

94. *O'Hagan*, 521 U.S. at 652.

95. A "security" covers a vast amount of possibilities. Rather than using all possible instances of securities in a company, for ease of exposition, this Note uses stocks or call options when referring to securities in a company.

for Company A's vaccine. After Company A announces that the vaccine has been approved and will be administered to the public, Company B's stock rises significantly. The stock purchased by the executive at Company A in Company B is now worth hundreds of thousands of dollars more, and the executive sells the stock cashing in on the spike in price.

2. Scenario Two: Similar Acquisition Target

Company X is a small market company that conducts specialized cancer research. An executive at Company X receives an email from the CEO that Company Y will be acquiring Company X in the immediate future. The executive at Company X then takes that material, nonpublic information and purchases stock in Company Z, a close competitor of Company X, knowing that it will affect Company Z's stock price. Companies X and Y announce their acquisition, and Company Z's stock price immediately rises. The stock purchased by the executive at Company X in Company Z is now worth hundreds of thousands of dollars more, and the executive sells the stock cashing in on the spike in price.

3. Scenario Three: Bankrupt Competitor

Tech Companies One and Two have been working on a new design that will change the entire market surrounding cell phones. An executive at Tech Company One receives an email from the CEO that their company will run out of funding soon, and the newest design has failed. The executive at Tech Company One then takes that material, nonpublic information and purchases stock in Company Two, knowing that it will affect Tech Company Two's stock price. Tech Company One announces that it will be filing for bankruptcy and bowing out of the race to design a new cell phone. Tech Company Two's stock price immediately rises. The stock purchased by the executive at Tech Company One in Tech Company Two is now worth hundreds of thousands of dollars more, and the executive sells the stock cashing in on the spike in price.

B. APPLYING CLASSICAL THEORY

Banning shadow trading under the classical theory is almost impossible. In *Chiarella*, under what is now known as the classical theory, the Supreme Court held that absent a duty to disclose, there is no

fraudulent activity.[96] The duty to disclose hinges on the relationship between the corporate insider and the shareholders.[97] The unique element of shadow trading is the lack of a fiduciary duty to shareholders. In a shadow trade, the securities purchased are not that of the company for which the corporate insider works. Instead, shadow trading occurs when a corporate insider trades on material, nonpublic information by buying a competitor or closely related company's stock. Thus, the corporate insider has no duty to the shareholders of those companies—all three executives in Scenarios One, Two, and Three trade in this manner.

The executive in Scenario One uses material, nonpublic information and trades in the securities of his company's supplier. Because the executive does not have a fiduciary duty to the supplier's shareholders, the classical theory cannot apply. Similarly, the executives in Scenarios Two and Three lack a fiduciary duty to the closely related corporation's shareholders, making the classical theory inapplicable to them as well.

In this application of the law, Panuwat would also be cleared of any insider trading allegations under the classical theory. Panuwat traded stock options of a similar oncology-based biopharmaceutical company.[98] Panuwat would owe a duty to disclose if it had been the stock of Medivation, as he owes them a fiduciary duty as a corporate insider for Medivation. However, that duty did not exist with Incyte, even though Panuwat allegedly used material, nonpublic information to purchase the stock options involving Incyte.

C. Applying the Misappropriation Theory

The misappropriation theory "premises liability on a fiduciary-turned-trader's deception of those who entrusted him with access to confidential information."[99] This theory captures "'outsiders' to a corporation who have access to confidential information that will affect th[e] corporation's security price when revealed, but who owe no fiduciary or other duty to that corporation's shareholders."[100] The use of the language "the corporation's securities price" as opposed to "a corporation" or "any corporation" implies that the misappropriator must

96. Chiarella v. United States, 445 U.S. 222, 235 (1980).
97. *Id.* at 227.
98. *Panuwat*, 2022 WL 633306, at *2.
99. *O'Hagan*, 521 U.S. at 652.
100. *Id.* at 653.

trade in the securities of one of the corporations who "entrusted" them with the material, nonpublic information.

Applying the misappropriation theory to shadow trading reveals two issues. First, under the theory of shadow trading explained in this Note, shadow traders are corporate insiders—not outsiders—to the company that entrusts them with the material, nonpublic information. For example, in *O'Hagan*, the Court ruled that O'Hagan, as an outsider, owed a duty to his law firm and client when he used material, nonpublic information of a tender offer to purchase stock in the targeted company.[101] Shadow trading differs significantly from the trading in *O'Hagan*. A shadow trader is an insider to the company that entrusts them with the information and the material, nonpublic information is not being used to trade in the securities of the corporations from which it originated.

This leads us to the second issue. The misappropriation theory traditionally covers material, nonpublic information that is used for trading in the companies that produced the material, nonpublic information.[102] The language used in the *O'Hagan* decision is clear that while no fiduciary duty is owed to shareholders, there is a duty owed to the sources—often corporations—that "entrust" a person with insider information.[103] However, if the material, nonpublic information being traded on is not in the securities of the source or the securities of a company involved in a deal with the source, the current doctrine of misappropriation does not cover such activity.

Applying the misappropriation theory to Scenarios One, Two, and Three further emphasizes the issues mentioned above. In all three scenarios, due to their positions in their own companies, the executives are entrusted with material, nonpublic information that will likely affect other companies. The argument can be made that they are outsiders to the companies in which they traded and knew that the material, nonpublic information would affect the stock of the closely related companies in which they traded. It may seem that this is exactly what *O'Hagan* was seeking to prevent.[104] However, O'Hagan traded on material, nonpublic information on a deal that directly involved the corporations he was an insider to and the information *they* "entrusted" him with.[105] The executives in each of the three scenarios—like Panuwat—stepped outside

101. *Id.* at 653-54.
102. *See generally id.*
103. *Id.* at 652.
104. *See id.* at 653.
105. *Id.* at 642.

the directly involved corporation(s) and traded in an outsider's or third party's securities. Therefore, distinct from *O'Hagan*, the executives in all three scenarios cannot be held liable under the misappropriation theory because the companies' securities in which they traded were not the companies who "entrusted" them with the material, nonpublic information.

In the case of *Panuwat*, the SEC argues that the misappropriation theory applies.[106] But that argument can be made because Panuwat signed a company policy agreeing not to trade Medivation securities "or the securities of another publicly traded company, including all significant collaborators, customers, partners, suppliers, or competitors of the Company."[107] This created a fiduciary or contractual duty not to trade on information he learned from his job.[108] In instances where there is no company policy in place to have employees agree not to trade on material, nonpublic information, the analysis of fiduciary duty has yet to be made. In fact, when considering whether Panuwat breached a duty to Medivation when trading in Incyte, the court did not address whether this duty existed solely based on his position at Medivation.[109] Instead, the court only pointed to his "contractual" duty based on the signed Medivation insider trading policy.[110]

Another argument under the misappropriation theory is that even though the executives in all three scenarios did not trade in companies directly involved, they misappropriated material, nonpublic information that belonged to their own corporations. In *Panuwat*, the court has acknowledged, and the SEC concedes, that there are no existing cases where the misappropriation theory was applied to trading on material, nonpublic information involving a third party to the information.[111] This raises the question of whether a corporate insider owes a duty to his or her own company not to trade in the securities of third-party corporations based on material, nonpublic information that was entrusted to them by their own corporation.

106. SEC v. Panuwat, No. 21-CV-06322, 2022 WL 633306, at *3 (N.D. Cal. Jan. 14, 2022).
107. *Id.* at *1.
108. *Id.* at *5.
109. *Id.* at *6.
110. *Id.*
111. *Id.* at *8.

D. APPLYING RULE 10B5-2

Rule 10b5-2 is used to define where a duty of trust and confidence to keep information private exists.[112] Such duty can exist under three non-exclusive circumstances:

> (1) Whenever a person agrees to maintain information in confidence; (2) Whenever the person communicating the material nonpublic information and the person to whom it is communicated have a history, pattern, or practice of sharing confidences, such that the recipient of the information knows or reasonably should know that the person communicating the material nonpublic information expects that the recipient will maintain its confidentiality; or (3) Whenever a person receives or obtains material nonpublic information from his or her spouse, parent, child, or sibling. . . .[113]

Applying Rule 10b5-2(b)(1), none of the three executives agreed to keep in confidence the material, nonpublic information they traded on. Therefore, no duty can be established under those circumstances. In *Panuwat*[114] the key difference in establishing a duty is that Panuwat signed a company policy agreeing not to deal in the company's securities or "the securities of another publicly traded company, including all significant collaborators, customers, partners, suppliers, or competitors."[115] Had this policy been signed by the executives in the three scenarios, they would all likely have a duty of trust and confidence under 10b5-2(b)(1) and be liable for insider trading as the court in *Panuwat* read the policy to include trading in any publicly traded company, not just the included examples.[116] This means the determination of liability for shadow trading couldturn on the existence of a company policy and how broad or narrow such policy is. For example, if a company policy did not include all publicly traded companies but only the list of "significant collaborators, customers, partners, suppliers, or competitors[,]"[117] the SEC would need to prove that the company's securities being traded were not just those of a collaborator, partner, supplier, or competitor, but a "significant" one. Even further, the breadth of such a list in a company's policy would change liability. If a policy only included collaborators,

112. 17 C.F.R. § 240.10b5-2 (2022).
113. *Id.*
114. Which is most similar to our hypothetical Scenario Two, *supra* Section II.A.2.
115. *Panuwat*, 2022 WL 633306, at *1.
116. *Id.* at *6.
117. *Id.* at *1.

customers, partners, and competitors, but not suppliers, then the executive in Scenario One would not be liable for insider trading because they traded in the needle supplier of the company.

Applying Rule 10b5-2(b)(2), none of the three executives share a history, pattern, or practice of sharing confidences in a way that resembles how the Rule has been previously applied. Few courts have mentioned Rule 10b5-2(b)(2) directly.[118] In *United States v. McGee*, the Third Circuit affirmed the conviction of Timothy McGee after he traded on material, nonpublic information regarding the sale of Philadelphia Consolidated Holding Corporation he received from Christopher Maguire.[119] The court ruled that a rational fact finder could conclude that a history or pattern of sharing confidences existed between McGee and Maguire.[120] Both attended Alcoholics Anonymous meetings where McGee served as a mentor for Maguire.[121] Maguire entrusted McGee with "extremely personal" confidences with the expectation that their conversations would not be disclosed.[122] Maguire also never disclosed any of the things he learned from McGee.[123] This pattern went on for almost a decade, which led the court to conclude there was sufficient evidence of a history and pattern of sharing confidences under Rule 10b5-2(b)(2).[124]

118. *See, e.g.*, United States v. McGee, 763 F.3d 304, 318 (3d Cir. 2014) (finding a history of sharing confidences between the tipper and tippee from Alcoholics Anonymous meetings established a history or pattern of sharing confidences under Rule 10b5-2(b)(2)); SEC v. Munakash, No. CV 16-833-R, 2016 WL 9137640, at *1-2 (C.D. Cal. May 16, 2016) (finding the sharing of family issues, failures, financial problems, and other sensitive topics over a lengthy friendship between tipper and tippee established a history or pattern of sharing confidences under Rule 10b5-2(b)(2)); SEC v. Conradt, 947 F. Supp. 2d 406, 412 (S.D.N.Y. 2013) (ruling sharing of family illnesses, seeking personal legal advice, legal advice for friends, and tearful exchanges between tipper and tippee established a history or pattern of sharing confidences under Rule 10b5-2(b)(2)); United States v. McPhail, 831 F.3d 1 (1st Cir. 2016) (ruling tipper and tippee shared confidential information in their lengthy relationship as golf partners regarding nonpublic information on several occasions establishing a history or pattern of sharing confidences under Rule 10b5-2(b)(2)).

119. *See generally McGee*, 763 F.3d 308.

120. *Id.* at 318.

121. *Id.* at 309.

122. *Id.* at 317.

123. *Id.*

124. *See id.* at 317-18.

No such pattern or history exists in any of the three scenarios.[125] Unlike *McGee*, *McPhail*, *Conradt*, and *Munakash*, there is no history of back-and-forth confidences but only a single email in a one-sided communication. Therefore, Rule 10b5-2(b)(2) would likely fail to capture instances of shadow trading where executives learn something during the course of their job and trade in a closely related company, much like the executives in all three scenarios.

Under Rule 10b5-2(b)(3), the executives in all three scenarios could only be found to have a duty of trust or confidence if the CEO who sent them the email was a spouse, parent, child, or sibling. Because the CEO in the scenarios did not fall into those close relationships, the executives in all three scenarios had no duty of trust or confidence under Rule 10b5-2(b)(3) and cannot be held liable for insider trading.

III. AMENDING RULE 10B5-2 TO PREVENT FUTURE SHADOW TRADES

A. THE NEED FOR A RULE TO PROTECT AGAINST SHADOW TRADING

The rational behind pohibiting shadow trading is similar to that of the general regulation of securities markets. The Supreme Court, when recognizing the misappropriation theory, did so to protect the integrity of securities markets.[126] The Court reasoned that investors would not venture into a market where trading on inside information was "unchecked by law."[127] Because current insider trading law does not capture shadow trading, it is left unchecked and gives insiders the very advantage the Court was trying to mitigate. This informational advantage also affects ordinary investors directly. The "protection of investors" emphasized in the reasons for regulating insider trading,[128] is not accomplished if shadow traders can leverage knowledge of inside information in purchasing securities. The anonymous trader on the other end of an inside trade who inherits a loss or misses out on a gain in previous theories of insider trading suffers the same consequence of being on the wrong end of shadow trades.[129]

If left under the current conditions, liability of insider trading in instances of shadow trading will rest on company policies. Not only the

125. *See supra* Sections II.A.1, II.A.2, II.A.3.
126. *See* United States v. O'Hagan, 521 U.S. 642, 653 (1997).
127. *See id.* at 658.
128. Guttentag, *supra* note 80, at 212-13.
129. *See* Wang, *supra* note 84, at 64.

existence of a company policy but also the breadth or inclusion of some magic words that would capture the shadow trade in its prohibitions.[130] It is not only unreasonable to allow liability under the law to rest on company policies, but it also creates unfairness and inconsistency in shadow trading prosecutions. For example, if two executives both use material, nonpublic information to trade in a closely related company, but only one of their companies has a shadow trading policy, then two people committing the same act will result in only one of them being liable for insider trading. A recent study suggests only 53 percent of companies currently have a policy like Mediviation's.[131] Furthermore, a policy that prohibits trading in the securities of collaborators, customers, and partners will create different liability than a policy that includes suppliers, and competitors.[132]

The need for a new rule stems from the inability of current common law and rules to capture instances of shadow trading. The classical theory does not apply due to shadow traders' lack of a duty to disclose. Typically, company insiders have a duty to disclose stemming from the fiduciary duty between insiders and the company's shareholders.[133] Shadow traders do not trade in the securities of their own company, nor a company involved in a deal with their company. Instead, they trade in the securities of closely related third party companies, and therefore escape liability under classical theory because they owe no fiduciary duty to the third party's shareholders.

For misappropriation theory to apply to shadow trading, the court would need to take an extremely more aggressive approach than they have traditionally. Presently, the common law imposes liability only on traders entrusted with inside information who then trade in the securities from which the information derived.[134]

The misappropriation theory rests on secretive fiduciary disloyalty.[135] "The insider deceives the source of the information–which the source entrusted to the insider with the expectation that he would act

130. *See supra* Section II.D.

131. *See* Mehta et al., *supra* note 7, at 29. The authors conducted a study on shadow trading involving 267 companies and their insider trading policies finding only 53 percent of companies had a policy prohibiting shadow trading. *Id.*

132. *See supra* Section II.D.

133. Chiarella v. United States, 445 U.S. 222, 227 (1980).

134. *See generally* United States v. O'Hagan, 521 U.S. 642 (1997).

135. Donald C. Langevoort, *"Fine Distinctions" in the Contemporary Law of Insider Trading*, 2013 COLUM. BUS. L. REV. 429, 441 (2013).

as a loyal fiduciary and not take personal advantage of it–by 'feigning' loyalty while acting selfishly."[136] However, the idea of feigning loyalty has typically occurred when an insider knows material, nonpublic information about a company and trades in the securities of that same company or one involved in a deal.[137] No current cases cover shadow trading, which is using that information to trade in a closely related company's securities.[138] It would be a far more aggressive approach to interpret feigning loyalty to apply to any use of material, nonpublic information. The court in *O'Hagan* stated, "misappropriators deal in deception: A fiduciary who pretends loyalty to the principal while secretly converting the principal's information for personal gain dupes or defrauds the principal."[139] O'Hagan "pretend[ed] loyalty" and "dupe[d] or defraud[ed]" the involved parties by purchasing stock options in the targeted company of the tender offer his firm was connected to.[140] O'Hagan owned more options of the target company than any other individual investor.[141] This is disloyal because O'Hagan directly capitalized on a deal involving parties to which he owed a duty of loyalty.

The Court directly pointed out "[t]he misappropriation theory targets information of a sort that misappropriators ordinarily capitalize upon to gain no-risk profits through the purchase or sale of securities. Should a misappropriator put such information to other use, the statute's prohibition would not be implicated."[142] It raises the question: is trading in a security that is completely separate from all companies who entrusted one with inside information still feigning loyalty? The answer to that question must be no. The trusted information that creates the need for loyalty and the selfish capitalization that breaks the loyalty do not stem from the same company. If the trading of securities that "misappropriators ordinarily capitalize upon" has always been from the directly involved companies, then anything outside of that, including trading in a separate third party, has to be considered "put[ting] such information to other

136. *Id.*

137. *See, e.g.*, Complaint at 4-7, SEC v. Glassner, No. 22-CV-04254 (S.D.N.Y. May 24, 2022) (charging biopharmaceutical consultant with insider trading when, after hearing from an executive about an imminent acquisition, he traded in the same company's securities).

138. SEC v. Panuwat, No. 21-CV-06322, 2022 WL 633306, at *8 (N.D. Cal. Jan. 14, 2022).

139. *O'Hagan*, 521 U.S. at 643.

140. *Id.* at 647-48.

141. *Id.*

142. *Id.* at 656.

use."[143] Therefore, a prohibition under misappropriation theory cannot apply and the loophole remains open calling for a rule outside of current misappropriation theory to address shadow trading.

B. RULE 10B5-2(B)(4) PROPOSAL

The amendment to Rule 10b5-2 that would regulate shadow trading should read:

> Whenever a person receives or obtains material, nonpublic information in the course of his or her employment about his or her own company that affects, or could reasonably be expected to affect, the equity, earnings, cash flows, market value, financial condition, future prospects, or stock price of a closely related company and the person knows or reasonably should know that the person who is the source of the material, nonpublic information expects that the person will maintain its confidentiality.

SEC rules are often lengthy[144] but the inclusion of all the necessary language is needed for the rule to function. Here, the specific language of "affects, or could reasonably be expected to affect, the equity, earnings, cash flows, market value, financial condition, future prospects, or stock price of a closely related company" in the proposed Rule 10b5-2(b)(4) is a non-exclusive list of indicia as to what affecting a closely related company could be. This is important for narrowing the companies affected by shadow trading. Outside of common sense as to what would affect a closely related company, this list serves as a starting point for courts to consider. This allows for factors like market size, impact, relatedness, and predictability to determine liability in shadow trades.

The "knows or reasonably should know that the person who is the source of the material, nonpublic information expects that the person will maintain its confidentiality" is expected to only apply to communications that would create an expectation of confidentiality. For example, an email or other communication from the CEO stating the company is doing well would not create an expectation of confidentiality. However, any communication from the CEO not made to the public that reveals an imminent merger, acquisition, product release, earnings report, bankruptcy, etc., would create a reasonable expectation of confidentiality.

143. *See id.*
144. *See, e.g.*, 17 C.F.R. § 240.10b5-2(b)(3) (2022).

C. APPLYING 10B5-2(B)(4)

Scenario One: Supplier

The executive in Scenario One took the material, nonpublic information that the vaccine had been approved and purchased stock in the corporation's biggest needle supplier.[145] The executive did this anticipating that when the news was released, the needle supplier's stock price would rise. The needle supplier would have an extreme boost in production and sales of needles, given the approval of a worldwide vaccine, and the stock price would reflect this after the announcement is made. The executive also should have reasonably known that the CEO expects him to keep the approval of the vaccine confidential, as that information will affect their own company significantly and had not yet been disclosed to the public.

Since the executive traded on material, nonpublic information, he expected to affect a closely related company and was expected to keep that information in confidence he would be liable for insider trading under proposed Rule 10b5-2(b)(4). Rule 10b5-2(b)(4) specifically targets this kind of shadow trading by establishing a duty in instances where insiders possess material, nonpublic information that will affect a closely related company in a meaningful way. However, if the executive had purchased stock in a major hotel or airline, the executive would not be liable under the proposed 10b5-2(b)(4). This is because, while vaccines for deadly viruses may affect travel, a hotel or airline is not a closely related company to a vaccine producer in the same manner as a direct needle supplier would be and does not have the same chances of a minimal risk trade.

Scenario Two: Similar Acquisition Target

The executive in Scenario Two took the material, nonpublic information that an acquisition of Company X, by Company Y, was imminent and purchased stock in Company Z, the corporation's biggest competitor.[146] The executive did this anticipating that when the news was released, the biggest competitor's stock price would rise as it would be a target for a similar acquisition. The executive also should have reasonably known that the CEO expects her to keep the news of the acquisition

145. *See supra* Section II.A.1.
146. *See supra* Section II.A.2.

confidential as that information will affect their own company significantly and had not yet been disclosed to the public.

Similar to Scenario One, proposed Rule 10b5-2(b)(4) captures this shadow trade as well because the executive traded on material, nonpublic information that she could reasonably expect to affect her company's biggest competitor and was expected to keep that information in confidence. The language of "the equity, earnings, cash flows, market value, financial condition, future prospects, or stock price of a closely related company" included in proposed Rule 10b5-2(b)(4) allows for regulators to consider market size in shadow trades similar to Scenario Two.

If the executive in Scenario Two worked at a small clothing line, she would not be liable for insider trading under proposed Rule 10b5-2(b)(4). Because the clothing market is so vast and diverse the acquisition of one clothing line does not create a reasonable expectation that any clothing lines will follow nor create accurate indicia of which clothing lines would be up for a similar acquisition the same way it would in a small market.

Scenario Three: Bankrupt Competitor

The executive in Scenario Three took the material, nonpublic information that Tech Company One was going bankrupt and purchased stock in the corporation's biggest and only competitor.[147] The executive did this anticipating that when the bankruptcy news was released, the competitor's stock price would rise. The executive also should have reasonably known that the CEO expects him to keep the news of bankruptcy confidential as that information will affect their own company significantly and had not yet been disclosed to the public.

Similar to Scenarios One and Two, Rule 10b5-2(b)(4) captures this shadow trade because the executive traded on material, nonpublic information that he could reasonably expect to affect his company's biggest competitor and was expected to keep that information in confidence. Similarly to Scenario Two, the language of Rule 10b5-2(b)(4) allows for consideration of market size. Here, if the executive in Scenario Three worked at a company in a large market, they would not be liable for insider trading. This is because in a vast market one bankruptcy does not create nearly the same effect on competitors compared to Scenario Three where there was only a single competitor in the market.

147. *See supra* Section II.A.3.

CONCLUSION

When done in specific circumstances, shadow trading allows for the exact minimal-risk trades courts have spent decades crafting common law trying to prevent. The cleverness of those seeking significant gains with minimal risks has allowed them to abuse a lophole in insider trading law. Until this loophole is closed, shadow traders are one step ahead of current regulations. "[I]nvestors do not expect the playing field to be level, but they do expect that those who 'have special access to information, because of employment or other relationships, should be barred from using that information to gain an advantage over the rest of us.'"[148] In an attempt to close this loophole, a broader and more aggressive reading of the common law to capture shadow trading would only contribute to continuing insider trading law's "topsy-turvy" development.[149] Amending Rule 10b5-2 to include a fourth circumstance in which a duty of trust in confidence exists would close the loophole that currently permits shadow trading in a much clearer and more concise manner.

148. SEC v. Talbot, 530 F.3d 1085, 1097 (9th Cir. 2008) (quoting Barbara Bader Aldave, *Misappropriation: A General Theory of Liability for Trading on Nonpublic Information*, 13 HOFSTRA L. REV. 101, 123 (1984) (comparing trading in a market with insiders misappropriating information to playing a game against someone with loaded dice)).

149. *See* Quigley, *supra* note 50, at 188 (citing United States v. Whitman, 904 F. Supp. 2d 363, 372 (S.D.N.Y. 2012) (Rakoff, J.) (remarking on "the topsy-turvy way the law of insider trading has developed in the courts"), *aff'd*, 555 F. App'x 98 (2d Cir. 2014)).

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 12, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
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600 Granby Street
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Dear Judge Walker:

I am a rising third-year law student at Loyola University Chicago. I am writing to apply for a clerkship in your chambers, for the 2024 term, for the following two reasons.

First, I am pursuing a clerkship to prepare for a potential career as a federal prosecutor. During law school, I interned with the U.S. Attorney's Office and Cook County State's Attorney's Office. These experiences sharpened my desire to work in public service as a government trial lawyer. My hope is that by clerking for you in particular—given your experience as an assistant U.S. attorney—I can gain critical experience to become an effective prosecutor.

Second, I am applying because I believe I have the requisite skill set to help your team. During law school, I developed my research and writing skills as a member of *Loyola Law Journal*. My research and writing improved during my externship in U.S. District Court with Judge Kness. These skills will improve further during my third year of law school when I extern again in U.S. District Court with Judge Durkin and join a moot court competition team. In addition to strong research and writing, I believe I have the capacity for rigorous, intellectual legal analysis—an attribute demonstrated by my academic performance and that my recommenders will verify.
verify.

Finally, although I live in Chicago, I would happily move to Norfolk. Enclosed are copies of my resume, transcripts, writing sample, and letters of recommendation. Thank you for your time and consideration.

Sincerely,
Scott Gumbiner

Scott Gumbiner

Scott Gumbiner

1108 N Damen Ave ♦ Chicago, IL 60622 ♦ (847) 602-3630 ♦ *sgumbiner@luc.edu*

EDUCATION

Loyola University Chicago School of Law, Chicago, IL
Juris Doctor expected, May 2024

- GPA: 3.83/4.0; Rank: Top 5%
- *Loyola Law Journal*, Staff Member
- Moot Court, Appellate Lawyers Association Competition Team
- CALI Award for Highest Grade in Legal Writing II

University of Michigan, Ann Arbor, MI
Bachelor of Arts in History, May 2014

JUDICAL EXTERNSHIP EXPERIENCE

U.S. District Court, Northern District of Illinois, Chicago, IL
Extern to the Honorable Thomas M. Durkin (August – November 2023) (Incoming)

U.S. District Court, Northern District of Illinois, Chicago, IL
Extern to the Honorable John F. Kness (January – April 2023)

- Drafted an opinion and order in response to a motion for summary judgment for an employment discrimination claim and an order in response to a motion to dismiss for a negligence claim.

INTERNSHIP EXPERIENCE

Cook County State's Attorney's Office, First Municipal, Chicago, IL
Summer 711 Intern (May – August 2023) (Current)

- Appear in court for misdemeanor proceedings, including bench trials, under the supervision of an assistant state's attorney.

United States Attorney's Office, Central District of Illinois, Urbana, IL
Summer Intern (June – July 2022)

- Conducted legal research and drafted memoranda on issues including a 50-state survey of permissibility of custodial arrests for petty offenses; whether a misunderstanding of the federal sentencing guidelines constituted plain error; and admissibility of co-defendant convictions at defendant re-trial under FRE 403.

OTHER PROFESSIONAL EXPERIENCE

IBM, Chicago, IL
Account Executive (January 2018 – August 2021)

- Managed IBM technology accounts, focusing on building a professional relationship, understanding customer technology problems through open-ended questions and active listening, and leading an IBM team to develop technical solutions.
- Technology solutions included cyber security, data management, cloud computing, and computer hardware.
- Exceeded 100% of sales quota for 2018, 2019, 2020, and 2021.

INTERESTS

Cross-training, cycling, cooking, and reading history books.

Name: **Scott Gumbiner**
Student ID: **00001592498**
Birthdate :

Print Date: 6/3/23

Beginning of Law Record

Fall 2021

Program: Law - Full-time Division

Course		Description	Attempted	Earned	Grade	Points
LAW	113	Civil Procedure	4.000	4.000	B+	13.320
LAW	152	Property	4.000	4.000	B+	13.320
LAW	162	Torts	4.000	4.000	A-	14.680
LAW	190	Legal Writing I	2.000	2.000	A	8.000
LAW	190R	Basic Legal Research	0.000	0.000	P	0.000
LAW	424	Prof. Identity Formation	1.000	1.000	P	0.000

Term GPA	3.523	Term Totals	15.000	15.000		49.320
Cum GPA	3.523	Cum Totals	15.000	15.000		49.320

Spring 2022

Program: Law - Full-time Division

Course		Description	Attempted	Earned	Grade	Points
LAW	122	Constitutional Law	4.000	4.000	A	16.000
LAW	132	Contracts	4.000	4.000	A	16.000
LAW	140	Criminal Law	3.000	3.000	A	12.000
LAW	192	Legal Writing II	2.000	2.000	A	8.000
LAW	461	Education Law and Policy	2.000	2.000	A	8.000

Term GPA	4.000	Term Totals	15.000	15.000		60.000
Cum GPA	3.770	Cum Totals	30.000	30.000		109.320

Fall 2022

Program: Law - Full-time Division

Course		Description	Attempted	Earned	Grade	Points
LAW	210	Evidence	4.000	4.000	A	16.000
LAW	240	Crim Procedure: Investigation	3.000	3.000	A	12.000
LAW	356	Storytelling & Present Skls	2.000	2.000	P	0.000
LAW	410	Legal Writing III	2.000	2.000	A	8.000
LAW	459	Intro to Engl Legal Prof	1.000	1.000	P	0.000
LAW	487	Law Journal Members	1.000	1.000	P	0.000

Term GPA	4.000	Term Totals	13.000	13.000		36.000
Cum GPA	3.824	Cum Totals	43.000	43.000		145.320

Name: **Scott Gumbiner**
Student ID: **00001592498**
Birthdate :

Print Date: 6/3/23

Spring 2023

Program: Law - Full-time Division

Course		Description	Attempted	Earned	Grade	Points
LAW	179	The Law of Jury Selection	2.000	2.000	A	8.000
LAW	221	Administrative Law	3.000	3.000	A	12.000
LAW	241	Criminal Proced: Adjudication	3.000	3.000	B+	9.990
LAW	411	Trial Practice I	3.000	3.000	A	12.000
LAW	487	Law Journal Members	1.000	1.000	P	0.000
LAW	573	Terrorism Prosecutions	2.000	2.000	A	8.000
LAW	599	Extern Intensive Fld Placement	3.000	3.000	P	0.000
Topic:		Judicial				
Term GPA	3.845	Term Totals	17.000	17.000		49.990
Cum GPA	3.830	Cum Totals	60.000	60.000		195.310

Fall 2023

Program: Law - Full-time Division

Course		Description	Attempted	Earned	Grade	Points
LAW	270	Business Organizations	4.000	0.000		0.000
LAW	377	Intellectual Property Law	3.000	0.000		0.000
LAW	412	Trial Practice II	3.000	0.000		0.000
LAW	414	Professional Responsibility	3.000	0.000		0.000
LAW	415	Trial of a Business Dispute	2.000	0.000		0.000
LAW	473	Class Actions	2.000	0.000		0.000

Term GPA	0.000	Term Totals	17.000	0.000	0.000
Cum GPA	3.830	Cum Totals	77.000	60.000	195.310

Law Career Totals

Cum GPA:	3.830	Cum Totals	77.000	60.000	195.310

End of Loyola Unofficial Transcript

June 04, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am a professor of law at the University of Oklahoma College of Law and served as a visiting professor at Loyola University Chicago School of Law for the 2021-22 school year. I write to recommend Scott Gumbiner for a clerkship in your chambers.

I first met Scott in spring 2022, when he was a student in my Contracts class at Loyola. Scott is the kind of student that professors look forward to having in class. He was consistently prepared for class and made helpful contributions to the discussion. He was also uniquely thoughtful about the subject matter covered. Scott frequently took advantage of my office hours, not because he was confused, but because he was curious about the deeper implications of our coverage in class. Our discussions touched on many of the broader themes of our class. What principles should courts consider when interpreting ambiguous terms? How should courts balance competing policies of fairness, certainty, predictability, and stability of contractual relationships? Which institutions should shape contract law—courts or legislatures? Scott's performance on my final exam demonstrates his comprehensive understanding of the subject matter, strong analytical skills, and outstanding writing abilities. As further evidence of his writing and analytical skills, Scott earned the CALI award in Legal Writing II.

Scott is an independent learner, meticulous in his oral and written communication, and a pleasure to be around. Further, I have never had any reason to question Scott's judgment or commitment to the ethical practice of law. My experience with Scott (and twelve years of law teaching experience) tells me that Scott has the intellectual ability, judgment, work ethic, and drive to become an asset in your chambers. I hope that you will give his application the attention that it merits.

If I can answer any questions, please do not hesitate to contact me.

Sincerely,

/s/ Kara Bruce

Kara Bruce
(504) 782-3443

June 05, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend Scott Gumbiner for a judicial clerkship in your chambers. Scott was a student in three of my classes: Constitutional Law, Criminal Procedure I, and Criminal Procedure II. As former clerk for Chief Judge Thomas E. Fairchilds at the United States Court of Appeals for the Seventh Circuit, I believe Scott would be an excellent choice as a judicial clerk.

Scott received an “A” Constitutional Law and an “A” in Criminal Procedure I. Scott was enrolled in my Criminal Procedure II class this most recent semester. Fewer than 10% of my students receive a grade of “A”. In addition to his excellent performance on my exams, Scott has distinguished himself through class participation and office hour attendance.

When cold-called, Scott is always prepared to accurately and succinctly recount the facts, holdings and reasoning’s of the assigned cases. If the class is tired, or students are struggling to grasp certain concepts, I often call on Scott for an answer that will move class along.

When the class discusses policy, Scott often volunteers thoughtful analysis. In particular, I am impressed with Scott’s ability to comprehend and articulate the countervailing policy perspectives and legal theories of a given topic—an important attribute for a judicial clerk. It is clear that he thinks deeply about the law and appreciates its nuance and complexities. Scott regularly attends office hours. He and I have discussed our mutual passion for history and its intersection with constitutional law. His questions demonstrate that he is motivated by a passion for the law, beyond a mere desire for good grades.

Scott also stands out for his professional demeanor. Scott is older than many of his peers, and his maturity shows. For example, when Scott comes to office hours, he comes prepared with a list of outstanding questions for us to discuss. In general, he is punctual, courteous and convivial. If hired, Scott would be consummate professional and a pleasure to work with on a daily basis.

Reviewing Scott’s transcript, two points stand out. First, his excellent grades demonstrate his work ethic and command of the law. Loyola University is a competitive institution, enforcing a strict grade curve. Scott could not have attained his grade point average without working extremely hard and having a natural talent for reading, writing and critical thinking. Second, Scott is persistent. His first semester, he received two “B+”s an “A-”, and an “A”. Since then, he achieved all “A”s. It is clear that Scott reflected on his first semester, adjusted his approach to law school and persisted to become one of our highest achieving students.

Finally, Scott is the kind of person we need as a leader in the legal community. Many of Loyola’s highest achieving students understandably leverage their success in school to secure lucrative jobs in private practice. Scott is different. Since our earliest discussions as a first-year student, he expressed a heart-felt desire to use his law degree for public service in government. If you hire Scott, you will mentor a young lawyer who is committed to using his career as a life-long mission to further the equal justice of law.

In short, I am confident that Scott would make an outstanding judicial clerk in your chambers. Perhaps more importantly, I hope you choose to hire Scott so he can receive the mentorship he needs to become a leader in the legal community.

If you need additional information about Scott Gumbiner, please feel free to contact me at (708) 829-8566 or by email at araphae@luc.edu.

Sincerely yours,

Alan Raphael

Associate Professor of Law

June 05, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

Scott Gumbiner is applying for the position of judicial law clerk. I write to recommend him without reservation and in the highest terms. I recently retired after having served as the associate dean at Loyola University Chicago School of Law since 1979. During that time, it has been my good fortune to know many wonderful students. Scott Gumbiner is one of them.

Scott is completing his second year of JD studies at Loyola. He is currently ranked within the top 5% of his class and a member of the Loyola Law Journal. He is serving this semester and through the summer as an extern in the Northern District of Illinois. I came to know him in the Spring 2022 semester when Scott was selected among dozens of applicants to participate as one of eight students in Loyola's annual London Comparative Advocacy Program. I have administered this program since 1988 and I came to know Scott well during the trip to London this past January. Our London Program aims to provide a unique perspective on the art of advocacy through observation of English criminal trials at the Old Bailey. Scott proved to be an enthusiastic and insightful observer of the English trial system and was unquestionably among the top students to ever participate in the program which brought our students together with members of the English legal profession both in and out of court. He improved the quality of the trip for everyone. In short, he was the perfect participant. It has been no surprise that during his time at Loyola, he won the respect and friendship of his classmates and faculty alike.

I firmly believe that in addition to strong academic preparation, it is important that our lawyers-in-training develop personal qualities that are necessary when working with clients, the public, and other members of the profession. In addition to his strong academic preparation and the activities and responsibilities that he has undertaken as a student, I believe that Scott has benefitted from an upbringing and work experiences that have resulted in exceptional personal skills. He is possessed of the personal and professional qualities necessary to succeed in our profession.

When we at Loyola go through the difficult process of hiring faculty, it's comforting to have someone step forward and say, "this person is terrific." I write to tell you that Scott Gumbiner is terrific. The strength and quality of his character, his skills and his knowledge will allow him to flourish, and you will benefit from his contributions. In addition to all the rest, you won't find a more pleasant person. He is an example of the best we have to offer from Loyola.

Please know that I understand the daunting task of selecting from among the candidates that will come before you. So, it is with a good measure of humility, but also with a high degree of moral conviction that I write to recommend Scott Gumbiner without any reservation whatsoever and with the greatest enthusiasm. If you have any questions, please contact me at jfaught@luc.edu.

Very truly yours,

James J. Faught (Ret.)

Associate Dean

Loyola University Chicago

School of Law

jfaught@luc.edu

Scott Gumbiner
1108 N Damen Ave ♦ Chicago, IL 60622 ♦ (847) 602-3630 ♦ *sgumbiner@luc.edu*

Writing Sample

Legal Writing II
Trial Brief: *Carson v. Morgan*
Loyola University Chicago School of Law
April 20, 2022

I am currently unable to use any writing sample from my judicial externship. As such, the below writing sample is a mock trial brief I submitted for my Legal Writing II class.

Thank you for your time.

IN THE SUPERIOR COURT OF NEW JERSEY
CAMDEN COUNTY
CHANCERY DIVISION B – FAMILY COURT

Sam Carson,
Plaintiff,

v. Docket No FV 21-123097

Brett Morgan,
Defendant.

MEMORANDUM IN OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS

INTRODUCTION

This is an action seeking a Final Restraining Order under New Jersey's Prevention of Domestic Violence Act ("Act"). Plaintiff, Sam Carson, obtained a Temporary Restraining Order from Defendant, Brett Morgan, on December 14, 2021, after Mr. Morgan shoved Mr. Carson. Subsequently, to determine whether to issue a Final Restraining Order, the Court heard testimony from Messrs. Carson and Morgan, as well as other witnesses. At the conclusion of this testimony, defense counsel moved to dismiss, arguing that the parties are not household members under the Act. The motion to dismiss should be denied because the parties are considered household members under the Act.

QUESTION PRESENTED

Whether Plaintiff and Defendant, who are suitemates that share a standard multi-bedroom house—separate bedrooms but shared common areas—are considered "household members" for the purposes of the Prevention of Domestic Violence Act.

STATEMENT OF FACTS

Plaintiff, Sam Carson, and Defendant, Brett Morgan, are classmates at Seton Hall University School of Law in Newark, New Jersey. (R. at 1.) In July of 2021, Plaintiff inherited a house from his family, located near campus. (R. at 1.) Plaintiff needed rent money to help cover the cost of taxes and maintenance on the house, so Plaintiff rented a room in the house to Defendant and Nick Coleman, also a classmate in law school. (R. at 2.)

The house was arranged as a standard multi-bedroom house. (R. at 2.) Each person had a private bedroom with shared common areas. (R. at 2.) Plaintiff had a private bathroom, while Defendant and Mr. Coleman shared a bathroom. (R. at 2.) The living room was shared by all house members and arranged as a common study area. (R. at 2.) The living room had three desks, separated by partitions, so that each person could have a private study space in the shared room. (R. at 2.) When the suitemates studied in the living room, each person used their own laptops but shared a printer. (R. at 2.) Additionally, the suitemates shared a single kitchen. (R. at 2.) Cooking supplies, expenses, and grocery shopping was handled individually by each suitemate, although the suitemates occasionally coordinated to order carry-out from a restaurant. (R. at 2.)

Prior to the assault on December 14, Plaintiff and Defendant had numerous conflicts. (R. at 4.) Tensions began in September and October when Defendant "completely took over the living room study" by listening to sports radio without headphones, impeding the other suitemates' ability to use the area for study. (R. at 4.) As a result, Plaintiff was forced to "live at the law library" to study, despite the fact that he owned the property. (R. at 4.) On September 16, when Plaintiff complained to Defendant about the loud talk radio, Defendant was combative and responded by telling Plaintiff to "get a life." (R. at 4.) This comment was particularly hurtful to Plaintiff as he

was being insulted inside his own home, and as suitemates, there was no place for Plaintiff to escape Defendant's harassment. (R. at 4.)

Later, on October 28, Defendant was yet again playing talk radio in the living room. (R. at 4.) In response, Plaintiff told Defendant that his football stories were stupid. (R. at 4.) Defendant then "flew into a rage" and told Plaintiff he was going to "teach him a lesson." (R. at 4.) Defendant was so visibly angry that Plaintiff worried Defendant would physically hit him during the confrontation. (R. at 4.)

On November 27, Plaintiff loaned Defendant his only copy of his class notes. (R. at 5.) Defendant kept them for twelve hours, despite Plaintiff repeatedly asking Defendant for them to be returned. (R. at 5.) Plaintiff later learned that Defendant went out drinking to the bar with Plaintiff's notes and joked to his friends that "[Plaintiff] won't be able to study at all" without his notecards. (R. at 5.) Defendant took a poll amongst the group of friends at the bar whether or not he should destroy Plaintiff's notes. (R. at 5.)

The assault at issue here occurred on December 14. (R. at 1.) While Plaintiff and Defendant were studying separately in the living room for upcoming exams, Plaintiff attempted to initiate a discussion with Defendant about his two previous late rent payments. (R. at 3.) Defendant had been four days late on rent due in September and had been three days late on rent in November. (R. at 8.) Plaintiff initiated the conversation with Defendant because Plaintiff wanted to ensure the late rent payments would not become an ongoing problem. (R. at 3.)

In response, Defendant avoided the conversation altogether. (R. at 3.) Defendant went into his private room, locked the door, and began blaring music. (R. at 3.) Plaintiff testified that this was a deliberate attempt to annoy him, as the Defendant knew that the loud music would make it difficult for Plaintiff to concentrate on his studies. (R. at 3.) Plaintiff then texted Defendant, asking

him to please turn down the music. (R. at 3.) Defendant refused, claiming that the music helped him study. (R. at 3.) Frustrated, Plaintiff responded by mentioning an incident that occurred a few months prior when Defendant borrowed Plaintiff's headphones without permission, and the headphones were subsequently stolen from the library. (R. at 3.) Defendant then flew into yet another rage and began yelling and screaming at Plaintiff. (R. at 3.) Defendant said he would replace Plaintiff's "stupid" headphones because he was sick of hearing about it, and that he had enough of Plaintiff asking him about rent money. (R. at 4.) Defendant then shoved Plaintiff across the room. (R. at 4.) Plaintiff fell and hit his head on the coffee table. (R. at 4.)

Plaintiff called the police. (R. at 4.) The police arrived and offered Plaintiff the option to place a restraining order against Defendant. (R. at 4.) Plaintiff agreed to place the restraining order because he did not feel safe in the house with Defendant, he fears that Defendant will try to jeopardize his law school career, and he is afraid Defendant will be violent towards him in the future. (R. at 5.)

APPLICABLE STATUTE

> "Victim of domestic violence" means a person protected under this act and shall include any person who is 18 years of age or older or who is an emancipated minor and who has been subjected to domestic violence by a spouse, former spouse, or any other person who is a present household member or was at any time a household member.

N.J.S.A. 2C:25-19.

ARGUMENT

I. THE MOTION TO DISMISS SHOULD BE DENIED BECAUSE THE PARTIES ARE HOUSEHOLD MEMBERS UNDER THE ACT.

Under the New Jersey Prevention of Domestic Violence Act, a "victim" is a person subjected to violence by a "household member." Id. The issue for the motion to dismiss is whether Plaintiff and Defendant are considered household members under the Act. (R. at 1.) Defendant's

shove of Plaintiff was previously deemed an "act of violence" under the Act. (R. at 1.) As such, whether the Defendant's shove is an act of violence is not at issue. As set forth below, Plaintiff and Defendant are properly considered household members under the Act.

A. The Legislative Intent of the 2015 Amendment to the Act was to Define Household Members Liberally to Give Courts the Power to Offer Protection to Victims as Justice Requires.

According to the Legislative Findings and Declarations of the Act, the purpose of the Act is to ensure victims of domestic violence the maximum protection from abuse the law can provide. South v. North, 304 N.J. Super. 104, 109 (Ch. Div. 1997). Furthermore, the section gives the courts the responsibility to protect victims from violence in family, or family-like settings, by providing victims access to civil and criminal remedies and sanctions. Id.

In any domestic violence case, courts must determine whether the plaintiff is in fact a victim of domestic violence as defined by the Act. Hamilton v. Ali, 350 N.J. Super. 479, 488 (Ch. Div. 2001). The legislative history of the Act shows that, previously, a victim had to be "cohabitants" with their abuser. Id. To qualify as cohabitants, the parties needed to be of the opposite sex, or, if not opposite sex, related by blood. Id. A 2015 amendment to the Act removed the requirement that victims be "cohabitants" with their abuser. Id. The legislature replaced it with the broader term, "household member," such that victims of violence need only be household members with their abuser to be protected. Id. As such, the 2015 amendment was a deliberate enlargement of the class of persons protected under the Act. Id.

Household member is not a term of art. Id. The term is flexible, capable of different definitions depending on the context in which it is used. Id. The legislature could have defined the term if it intended to restrict the courts' discretion to apply the Act liberally. Id. Instead, the legislature left the term undefined. Id. Thus, when the legislature replaced the word "cohabitants"

with "household member," it intentionally replaced a rigid word with a more flexible term—inviting the courts to construe the term liberally and use their equitable powers to offer protection to victims on a case-by-case basis as justice may require. Id.

Here, Plaintiff and Defendant's relationship is precisely the circumstance that the legislature's broadening of the Act was intended to capture. Although the parties' relationship does not fall into traditional domestic violence categories, justice requires that Plaintiff is afforded protection under the Act.

The pattern of Defendant's behavior demonstrates that the abuse will not stop without a restraining order. Prior to the assault, Defendant humiliated Plaintiff on September 16, telling him to "get a life." (R. at 4.) Defendant further humiliated Plaintiff when he took Plaintiff's notecards to the bar and joked with classmates that he might not return the cards to sabotage Plaintiff's law school performance. (R. at 5.) Additionally, Defendant physically threatened Plaintiff on October 28, telling Plaintiff he was going to "teach him a lesson." Throughout these abusive episodes, Defendant resisted Plaintiff's overtures to resolve their disputes amicably. (R. at 3–4.) Ultimately, Defendant's abuse culminated on December 14, when Defendant violently shoved Plaintiff, striking his head on a coffee table. (R. at 4.) Furthermore, the parties are classmates in law school so they will continue to encounter each other in school and in the community. (R. at 1.) Given Defendant's history of persistent abuse and the parties' continued contact in law school, the parties cannot be left to resolve any future disputes on their own. Justice requires that Plaintiff is granted a restraining order from the Court to prevent further abuse.

In sum, the parties should be deemed household members. The legislature's broadening of the Act to cover household members was intended to capture precisely this circumstance—to allow

courts flexibility to use their equitable powers to offer victims protection from domestic violence on a case-by-case basis as justice may require.

B. The Parties are Household Members in Accordance with Relevant New Jersey Case Law.

New Jersey courts have held college suitemates who share a standard multi-bedroom apartment or house are household members under the Act. Id. Additionally, the parties meet at least four of the five criteria courts use to determine whether parties have sufficient frequency of time spent together to establish household membership. Desiato v. Abbott, 261 N.J. Super. 30, 34 (Ch. Div. 1992). Finally, the parties are household members because the nature of their relationship leaves Plaintiff vulnerable to Defendant's abusive and controlling behavior. S.Z. v. M.C., 417 N.J. Super. 622, 625 (App. Div. 2011).

Parties who share a standard multi-bedroom apartment or house are household members under the Act. Hamilton, 350 N.J. Super. at 488. In Hamilton, the plaintiff and defendant were college students who shared a nine-student suite. Id. at 480-81. The plaintiff and defendant lived in separate bedrooms but shared the common living room and bathroom. The court held that the parties were household members. Id. at 488. The court reasoned that the status of household membership must be based upon the "qualities and characteristics of the particular relationship" and not upon a "mechanical formula" such as a romantic partner or family member. Id.

Here, Plaintiff and Defendant are household members because the parties' shared housing arrangement as suitemates is precisely on point to the housing arrangement in Hamilton. Plaintiff and Defendant are classmates in the same higher education degree program and share a typical living arrangement for university students—an apartment or house with separate bedrooms and shared common areas. (R. at 2–3.) Although the Plaintiff and Defendant do not share a bathroom, as the parties do in Hamilton, Plaintiff and Defendant nevertheless share all other common areas

typical of student housing arrangements. (R. at 2–3.) Indeed, they share a kitchen as well as a living room organized so that the suitemates can study in the room simultaneously. (R. at 2–3.) Thus, the relationship and rooming arrangements here is substantively indistinguishable from Hamilton. Courts have held this kind of student housing is susceptible to abusive and controlling relationship dynamics such that the parties are considered household members and afforded protection under the Act. Hamilton, 350 N.J. Super. at 488.

Additionally, Plaintiff and Defendant are household members under the Act because they satisfy four of the five criteria New Jersey courts have used to determine whether parties have sufficient "frequency of time" spent together to establish household membership. Desiato, 261 N.J. Super. at 34. In Desiato, the plaintiff and defendant were romantic partners. Id. at 31–33. Although the plaintiff's official residency remained elsewhere, the plaintiff regularly spent nights at the defendant's residence, sometimes for weeks at a time, in effect living with the defendant. Id. The court held that the parties were household members. Id. at 34.

The court reasoned that the term household member is not a word of art; it does not require, for example, that the parties have official residency together, have ever been married, or have a child in common together. Id. Rather, household membership is a case-by-case determination measured by the "frequency of time" parties spend together in the context of, but not limited to, the following criteria: (1) constancy of the relationship, (2) over-night stays at each other's residence, (3) personal items such as jewelry, clothing and person grooming effects stored at each other's residences, (4) shared property arrangements such as automobiles, bank accounts or mailing address, and (5) familiarity with each other's family. Id. The court determined that the parties met four of the five criteria, and thus, were household members. Id.

Here, the parties are household members because Plaintiff and Defendant satisfy four of the five Desiato factors. First, Plaintiff and Defendant were in constant contact with each other given the use of a common entrance into the house, shared kitchen, and a shared living room arranged to accommodate the suitemates' simultaneous study. (R. at 2–3.) Second, the parties had over-night stays at each other's residence. (R. at 2–3.) Their space was so confined that Plaintiff could hear music being played in Defendant's bedroom. (R. at 3.) Third, the parties shared items at their residence including a printer. (R. at 2–3.) Fourth, the parties shared property arrangements manifested most clearly by a common mailing address. (R. at 14.) Fifth, and finally, while there is no indication that the parties are familiar with each other's family in a social setting, there was potential for interaction with one another's family as parents often visit their children at university to celebrate special occasions. Thus, the Plaintiff and Defendant are household members because they satisfy four of the five criteria courts have used to determine whether parties' frequency of time spent together is sufficient to establish their status as household members.

Moreover, Plaintiff and Defendant are household members because the nature of the parties' relationship leaves Plaintiff susceptible to abusive and controlling behavior. S.Z., 417 N.J. Super. at 625. In S.Z., the defendant was the bookkeeper for the plaintiff's business and needed a place to live. Id. at 623-24. The plaintiff allowed the defendant to reside with him and his family for approximately seven months. Id. The plaintiff alleged that when he got out of the shower, he discovered the defendant standing on a ladder against the outside of the house, peering through the bathroom window, smiling. Id. On another occasion, the plaintiff left the shower and noticed the defendant coming down from the same ladder. Id. After expelling the defendant from his home, the plaintiff discovered that the defendant had placed a hidden camera in his truck, and the plaintiff spotted the defendant following him on two occasions. Id. The court held that although the

relationship between the parties was not a traditional familial, romantic, or sexual relationship, the parties were nevertheless household members. Id. at 625. The court reasoned that the "qualities and characteristics of their relationship" place the plaintiff in a more "susceptible position" for abuse and controlling behavior. Id.

Here, Plaintiff and Defendant are household members because, like in S.Z., the qualities and characteristics of the parties' relationship leaves Plaintiff susceptible to abuse. Defendant showed a pattern of physical and emotional abuse throughout their time living together as suitemates. (R. at 2–4.) On one occasion, when Plaintiff complained to Defendant that he was playing sports talk radio in the living room, disrupting Plaintiff's studying, Defendant physically threatened and intimidated Plaintiff. (R. at 4.) Defendant emotionally abused Plaintiff by stealing his law school notes and joking with his friends that he would never give them back to Plaintiff to sabotage his studies. (R. at 5.) When Plaintiff was at last able to confront Defendant to begin a conversation about Defendant's previous late rent payments, Defendant screamed and physically assaulted the Plaintiff inside their shared suite. (R. at 3.) Finally, Defendant is physically bigger than Plaintiff, and Plaintiff continues fear that Defendant will sabotage his studies in law school or physically assault him again. (R. at 3, 5.) Thus, the qualities and characteristics of the parties' relationship leaves Plaintiff unable to escape persistent harassment from the Defendant. Plaintiff is in a position of perpetual vulnerability and lives in a state of on-going fear of physical and emotional abuse. Accordingly, under New Jersey law, the qualities, and characteristics of the parties' relationship establishes their household membership.

In conclusion, the case law demonstrates that the parties are household members. New Jersey courts have held suitemates who share a standard multi-bedroom apartment or house are household members. The parties satisfy four of the five criteria courts have used to determine

whether parties have sufficient frequency of time spent together to establish their household membership. Lastly, the nature of the parties' relationship leaves Defendant susceptible to abusive and controlling behavior.

C. As a Matter of Public Policy, Suitemates Should be Afforded Protection Under the Act.

As a matter of public policy, suitemates should be household members because protection under the Act is often a preferable legal remedy to criminal prosecution for victims of domestic violence perpetrated by their suitemates. Nicole M. Decker, An American Household: Massachusetts' Abuse Prevention Act and Its Application to College Roommates, 108 Penn St. L. Rev. 1273, 1279 (2004). Moreover, non-familial and non-romantically involved suitemates is a significant and growing proportion of housing arrangements in the United States, and suitemate household dynamics are particularly susceptible to abuse. Allie Volpe, The Strange, Unique Intimacy of the Roommate Relationship, The Atlantic, Aug. 2018.

There are numerous reasons why victims of domestic violence may prefer protection under a domestic violence statute to criminal prosecution of their abuser. Decker, supra, at 1279. First, a victim may simply seek a restraining order to ensure their own safety but prefer to avoid causing additional harm to their abuser with criminal prosecution. Id. If a victim's only remedy is criminal sanction, the victim simply may avoid legal remedies altogether, leaving them vulnerable to future abuse. Second, the victim can obtain prompt relief through a restraining order in chancery court and avoid the substantial time and mental turmoil of bringing criminal prosecution. Id. Third, in chancery court, a victim generally need only show that there is a substantial likelihood of immediate danger of abuse to obtain a restraining order, whereas criminal prosecution requires proof of all elements beyond a reasonable doubt. Id. This lower burden offers protection to deserving victims who might otherwise not be able to prove all elements for a criminal conviction.

Id. Finally, a civil action in chancery court provides victims agency in seeking a legal remedy rather than rely on state action to bring criminal charges. Id. Thus, as a matter of public policy, Plaintiff and Defendant should be household members because protection under the Act is often the preferred legal remedy for victims of domestic violence.

Moreover, as a matter of public policy, Plaintiff and Defendant should be considered household members because non-familial and non-romantic suitemates are a significant and growing proportion of housing arrangements in the United States, and suitemate household dynamics are particularly susceptible to abuse. Volpe, supra. In past decades, many adults in their twenties and thirties shared housing with their spouse. Id. By 2017, however, nearly thirty-two percent of the overall American adult population lived with a suitemate. Id. A U.S. Census Bureau demographer noted that in 2015, most adults between the ages of eighteen and thirty-two lived with a suitemate, rather than living independently or with a spouse or romantic partner. Id. This trend was likely spurred by the 2008 recession, but the trend has continued after economic recovery. Id. Delayed marriage rates, high student-loan debt, and rising housing costs contribute to the trend's durability. Id.

These living arrangement between non-familial, non-romantic suitemates often create interpersonal dynamics that are more susceptible to abuse than traditional living arrangements. For example, many young people live with a suitemate out of economic necessity rather than choice. Id. While sharing housing costs with a suitemate may be a financially sound decision, the social implications of living with a suitemate are often unknown until after suitemates have signed a lease and incurred significant costs and hardships to move in together. Id. This combination of living with a suitemate out of economic necessity and the lack of predictability of the quality of the relationship until after the fact, makes the suitemate relationship particularly vulnerable to

unforeseen abuse. Id. Accordingly, Plaintiff and Defendant should be household members because suitemate relationships leave parties acutely vulnerable to abuse and thus require protection under the Act.

In sum, as a matter of public policy, the motion to dismiss should be denied. Suitemates should be considered household members because protection under the Act is often a preferable legal remedy to criminal prosecution. Moreover, non-familial and non-romantically involved suitemates is a significant and growing proportion of housing arrangements in the United States, and suitemate housing dynamics are particularly susceptible to abuse.

CONCLUSION

Plaintiff, Mr. Carson, qualifies as a victim under the Act because he and Defendant, Mr. Morgan, are household members. The legislature intended the term "household member" to be construed liberally to allow courts flexibility to use their equitable powers to offer victims protection from domestic violence on a case-by-case basis as justice may require. Additionally, applying New Jersey case law demonstrates that: (1) university suitemates with separate bedrooms and shared common areas are household members, (2) the parties meet four of the five criteria New Jersey Courts have used to determine whether parties have sufficiency of contact to constitute household membership, and (3) Plaintiff is sufficiently vulnerable to future abuse from Defendant that this Court must use its equitable powers to afford Plaintiff protection under the Act. Finally, the suitemate living arrangement that exists between Plaintiff and Defendant ought to be protected as a matter of public policy: suitemates comprise a substantial and growing proportion of housing arrangements, and these relationships are uniquely susceptible to abusive dynamics.

Applicant Details

First Name	**Berke**
Middle Initial	**B.**
Last Name	**Gursoy**
Citizenship Status	**U. S. Citizen**
Email Address	**bbg250@nyu.edu**
Address	**Address** Street **15 Stanton Street** City **New York** State/Territory **New York** Zip **10002** Country **United States**
Contact Phone Number	**6319428085**

Applicant Education

BA/BS From	**Cornell University**
Date of BA/BS	**May 2018**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 25, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**New York University Journal of International Law and Politics**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Perry, Avi
avi.perry@usdoj.gov
202-616-4619

Weissmann, Andrew
andrewweissmann@gmail.com
917-575-2171

Hershkoff, Helen
Hershkoff@mercury.law.nyu.edu
212-998-6285

Brooks, Richard
rrb5@nyu.edu
_212_ 998-6619

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Berke Gursoy
15 Stanton Street, Apt. 2D
New York, NY 10002

June 12, 2023

The Honorable Jamar Walker
United States District Court
Eastern District of Virginia
Albert V. Bryan United States Courthouse
401 Courthouse Square
Alexandria, VA 22314

Dear Judge Walker,

I am writing to apply for a clerkship in your chambers for the 2024-2025 term. I am a rising third-year student at New York University School of Law, where I am the Senior Notes Editor of the New York University Journal of International Law and Politics, a research assistant for Professor Helen Hershkoff, and a teaching assistant for Professor Andrew Weissman. I have been the Vice President of the Prosecution Legal Society and the Social and Mentorship Chair for the National Security Law Society.

I am also particularly interested in this clerkship as I lived and worked in D.C. in the years prior to law school and returned last summer to intern. Indeed, it is my ambition to work for the government and practice in D.C..

As you will see from my attached resume, I have extensive legal work experience, first as a paralegal and then as an intern at the Department of Justice across the various sections and US Attorney's Offices. As a paralegal, I assisted in document review and legal citation checking for complex federal investigations. I also worked on and attended several trial cases, including *United States v. Vorley* and *United States v. Bases*. As a DOJ intern, I performed legal research and drafted briefs and motions for submission to the court, including motions in limine regarding various evidentiary issues. Currently, I am a summer associate at Sullivan & Cromwell, and am engaged in detailed research across a variety of litigation matters. Based on these experiences and my exemplary work ethic, I am prepared for the exciting challenges of a federal judicial clerkship.

My resume, unofficial transcript, and writing sample are submitted with this application. The writing sample is a memorandum discussing potential reforms to the legal standard for pen registers, written for my externship at the US Attorney's Office for the Southern District of New York.

Letters of recommendation from the following people will arrive separately:

Chief Avi Perry US Department of Justice - Criminal Fraud Section, Market Integrity & Major Frauds Unit Washington D.C. Avi.Perry@usdoj.gov 202-770-7741	Professor Helen Hershkoff NYU School of Law New York, New York Hershkoff@mercury.law.nyu.edu 212-998-6285.	Professor Andrew Weissman NYU School of Law New York, New York andrewweissmann@gmail.com; aw97@nyu.edu 917-575-2171.	Professor Richard Brooks NYU School of Law New York, New York rrb5@nyu.edu 212-998-6285; 203-500-9002

I have also attached a list of references with whom I have worked directly over the course of my legal career.

Please let me know if I can provide any additional information. I can be reached by phone at 631-942-8085 or by email at bbg250@nyu.edu. Thank you very much for considering my application.

Respectfully,

Berke Gursoy
Candidate for Juris Doctor 2024

Additional References

Assistant Chief Kyle Hankey
US Department of Justice - Criminal Fraud Section
Washington D.C.
Kyle.Hankey@usdoj.gov
202-770-7741

Assistant United States Attorney Margaret Lynaugh
US Attorney's Office for the Southern District of New York
New York, New York
Margaret.Lynaugh@usdoj.gov
212-637-2448.

Acting Director of Litigation
Brian Young
US Department of Justice – Antitrust Division
Brian.Young5@usdoj.gov
202-445-1183

BERKE B. GURSOY

631-942-8085 bbg250@nyu.edu

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
Candidate for J.D., May 2024
Honors: *Journal of International Law and Politics*, Senior Notes Editor, Dean's Scholarship (partial tuition, merit scholarship)
Activities: Prosecution Legal Society, Executive Board Member
National Security Law Society, Social Outreach and Mentorship Chair
Professor Andrew Weissman, Criminal Procedure Teaching Assistant

CORNELL UNIVERSITY, Ithaca, NY
B.A. in Government, Economics, and History; minor in Near Eastern Studies, May 2018
Honors: Dean's list, Academic All-Ivy Men's Rugby Team 2017
Activities: Pi Lambda Sigma (government professional fraternity), Founding Member and Vice President
Cornell International Affairs Observer, Writer
Publication: *The Eagle's Rise: Napoleon Bonaparte's First Campaign and the Birth of Napoleonic Warfare*, published in the ARMSTRONG UNDERGRADUATE JOURNAL OF HISTORY (2019)

EXPERIENCE

SULLIVAN & CROMWELL, New York, NY
*Summer Associate***,** May 2023 – Present

U.S. ATTORNEY'S OFFICE: SOUTHERN DISTRICT OF NEW YORK, CRIMINAL DIVISION, New York, NY
Legal Intern, January 2023 – May 2023
Drafted several *in limine* motions. Conducted legal research on topics including self-defense law within the Second Circuit, the standard for involuntariness under Miranda, and the applicability of criminal charges. Performed extensive document review.

PROFESSOR HELEN HERSHKOFF, NYU SCHOOL OF LAW, New York, NY
Research Assistant, May 2022 – August 2022 and January 2023 – Present
In preparation for the annual Civil Procedure Supplement written by Professor Hershkoff, conducted legal research in lower courts' application of the Supreme Court's decision in *Ford Motor Co. v. Montana Eighth Judicial Dist.* Conducted legal research and drafted chapters of the yearly update memo for the Civil Procedure casebook: Friedenthal, Miller, Sexton & Hershkoff, Civil Procedure: Cases and Materials.

U.S. DEPARTMENT OF JUSTICE: ANTITRUST DIVISION, CRIMINAL SECTION, Washington, DC
Legal Intern, August 2022 – January 2023
Drafted several *in limine* motions. Conducted legal research on topics including the pertinency of spousal privilege to common law marriages, Circuit interpretations of Fed. R. Crim. P. 6(e), and the application of various Fed Rules Evidence within the 11th Circuit.

U.S. DEPARTMENT OF JUSTICE: CRIMINAL DIVISION, FRAUD SECTION, Washington, DC
Legal Intern, May – July 2022
Drafted an MLAT request, a Pen Register application, letters to foreign officials regarding sharing of evidence, a Memorandum on charging decisions under the Foreign Corrupt Practices Act, and various motions. Conducted extensive document review. Researched the Crime Fraud exception to attorney-client privilege in certain Circuit Courts and performed trial prep research relating to *Daubert* and other anticipated *in limine* motions.

U.S. DEPARTMENT OF JUSTICE: CRIMINAL DIVISION, FRAUD SECTION, Washington, DC
Paralegal Specialist II (Contractor-CACI), August 2019 – August 2021
Participated in all facets of trial preparation and proceedings for two actions and was awarded the U.S. Department of Justice Performance Award for achievement during trial. Created exhibits and charts for use as evidence, tracked admission of exhibits into evidence and monitored trial proceedings. Reviewed and processed incoming documents for relevance to investigations and for criminal indictment. Drafted subpoenas, cover letters, and preservation requests. Edited Motions for both content and style.

HUDSON INSTITUTE, Washington, DC
Research Intern, May – November 2017 and November 2018 – April 2019
Gathered open-source intelligence and wrote mock intelligence reports for use in nuclear terrorism simulation held for members of Congress and their staff. Edited Articles for both content and style.

COMMISSION ON SECURITY AND COOPERATION IN EUROPE, Washington, DC
Max Kampelman Policy Fellow, U.S. Helsinki Commission, June – September 2018

ADDITIONAL INFORMATION
Fluent in Turkish. Skilled in Relativity. Completed New York marathon with a time of 3:27. Avid Steelers fan.

Name: **Berke B Gursoy**
Print Date: **06/11/2023**
Student ID: **N17371859**
Institution ID: **002785**
Page: **1 of 1**

New York University
Beginning of School of Law Record

Fall 2021

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Tyler Rose Clemons			
Torts	LAW-LW 11275	4.0	B+
Instructor: Mark A Geistfeld			
Procedure	LAW-LW 11650	5.0	A-
Instructor: Helen Hershkoff			
Contracts	LAW-LW 11672	4.0	B
Instructor: Richard Rexford Wayne Brooks			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Robert L Howse			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2022

School of Law
Juris Doctor
Major: Law

Constitutional Law	LAW-LW 10598	4.0	A
Instructor: Daryl J Levinson			
Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Tyler Rose Clemons			
Legislation and the Regulatory State	LAW-LW 10925	4.0	A-
Instructor: Adam B Cox			
Criminal Law	LAW-LW 11147	4.0	B+
Instructor: Ekow Nyansa Yankah			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Robert L Howse			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2022

School of Law
Juris Doctor
Major: Law

Colloquium on Constitutional Theory	LAW-LW 10031	2.0	A
Instructor: Daryl J Levinson, Emma M Kaufman			
Criminal Procedure: Fourth and Fifth Amendments	LAW-LW 10395	4.0	A
Instructor: Andrew Weissmann			
International Law	LAW-LW 11218	3.0	B
Instructor: Mattias Kumm			
Evidence	LAW-LW 11607	4.0	A
Instructor: Daniel J Capra			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	43.0	43.0

Spring 2023

School of Law
Juris Doctor
Major: Law

Complex Litigation	LAW-LW 10058	4.0	B+
Instructor: Samuel Issacharoff, Arthur R Miller			
Prosecution Externship - Southern District Seminar	LAW-LW 10835	2.0	A-
Instructor: Margaret S Graham, Negar Tekeei			
Prosecution Externship - Southern District	LAW-LW 11207	3.0	CR
Instructor: Margaret S Graham, Negar Tekeei			
Income Taxation	LAW-LW 11994	4.0	A
Instructor: Daniel Jacob Hemel			
National Security Law	LAW-LW 12256	2.0	A-
Instructor: Ryan Goodman, Andrew Weissmann			

	AHRS	EHRS
Current	15.0	15.0
Cumulative	58.0	58.0

Staff Editor - Journal of International Law & Politics 2022-2023

End of School of Law Record

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD CLASS OF 2023 AND LATER & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

First-Year JD (Mandatory)	**All other JD and LLM (Non-Mandatory)**
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
Maximum for A tier = 31%	***Maximum for A tier = 31%***
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
Maximum grades above B = 57%	***Maximum grades above B = 57%***
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

Pomeroy Scholar:	Top ten students in the class after two semesters
Butler Scholar:	Top ten students in the class after four semesters
Florence Allen Scholar:	Top 10% of the class after four semesters
Robert McKay Scholar:	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, nor to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021

U.S. Department of Justice

Criminal Division

Fraud Section *Washington, D.C. 20530*

May 31, 2023

Your Honor:

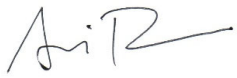
I write to recommend Berke Gursoy as an outstanding candidate for a judicial clerkship. Berke's academic record and credentials speak for themselves. I write to offer my perspective on his personal qualities. I worked closely with Berke during his time serving as a paralegal at the U.S. Department of Justice, and I have complete confidence he will be a first-rate law clerk. Among the dozens of interns and paralegals I have supervised as a federal prosecutor, Berke stands out as one of the smartest and most reliable.

Berke was one of two principal paralegals on my three most significant cases, including two multi-week jury trials. In each matter, he showed a strong work ethic, an appreciation for detail, and (most importantly) good judgment. Despite around-the-clock hours and the high pressure of federal criminal trials (during the coronavirus pandemic, no less), Berke never missed a beat. He threw himself into trial preparation—finding key documents, helping to prepare witnesses, and making sure no detail went overlooked. The attorneys came to trust his judgment and to rely on him for crucial tasks.

Reflecting on my own experience as a law clerk in federal district court and the First Circuit Court of Appeals, I believe Berke is exactly the type of person who will excel in a clerkship. He is smart, hard-working, attentive to details, easy to get along with, and full of integrity. Berke also is a true team player, willing to work hard in support of a greater mission. I am certain he will serve with distinction as a clerk and be a welcome addition in chambers.

Please don't hesitate to call or email me if you have any questions. I can be reached at (202) 616-4619 or avi.perry@usdoj.gov.

Yours,



Avi Perry
Chief
Market Integrity & Major Frauds Unit
Fraud Section, Criminal Division
U.S. Department of Justice

NYU LAW

ANDREW WEISSMANN
Professor of Practice

School of Law
Center on the Administration of Criminal Law
40 Washington Square South, 302A
New York, NY 10012
P: 212 998 6119
andrew.weissmann@nyu.edu

June 12, 2023

RE: Berke Gursoy, NYU Law '24

Your Honor:

I write to recommend Berke Gursoy for a clerkship. At NYU School of Law, I taught Berke in both my Criminal Procedure and National Security courses. Based on his work in both classes, I selected Berke to be my Teaching Assistant in my 2023-24 Criminal Procedure course. As that appointment would suggest, I recommend him highly as a law clerk. I have no doubt that you would find him sharp, creative, diligent, efficient, and thorough, and a careful and clear writer. Berke is also a delight to work with and I am confident he would be a valued and collegial addition to your chambers.

I met Berke in the fall of 2022 in my course Criminal Procedure: Fourth, Fifth and Sixth Amendments. Berke was a consistently thoughtful participant within and outside of class. I was not at all surprised when he received an A (grades are given out blind).

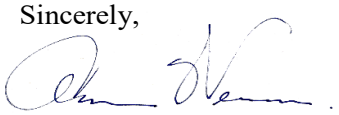
Then in spring 2023, Berke was a member of my National Security seminar, where I got to know him better and was able to assess his writing abilities (the seminar had 27 students and required the submission of three papers). Berke continued to be a thoughtful and diligent participant in class, asking clear and cogent questions, demonstrating his deep immersion in the assigned material and his inquisitive mind. His three papers were excellent: he picked interesting topics, researched them well, and wrestled with the pros and cons of a topic. His writing was also unusually well organized and clear, and unmarred by typos and other distracting errors. Again, Berke received an A in the class, given his stellar performance.

Based on all of this, and his clear enthusiasm for the subject matter in both classes, he was my first choice to be my sole Teaching Assistant for my Criminal Procedure course this upcoming academic year. Indeed, I know Berke is particularly interested in criminal law, and worked at the Department of Justice as a paralegal in the Fraud Section (a section for which I served as Chief for four years prior to Berke's tenure there). We have discussed his work there and his clear enthusiasm for the work of that section and the Department in general. And at NYU he has continued through externships to stay connected to this type of work in both the Antitrust Division and the Southern District of New York U.S. Attorney's Office.

Finally, Berke is a pleasure to deal with, and I have no doubt will work very well with other clerks, displaying collegiality and intellectual curiosity.

Please let me know if there is any further information I can provide about Berke. I can be reached by email at aw97@nyu.edu or 917-575-2171.

Sincerely,



Andrew Weissmann

New York University
A private university in the public service

School of Law
40 Washington Square South, Room 308C
New York, NY 10012-1099

Helen Hershkoff
Herbert M. and Svetlana Wachtell Professor of Constitutional Law and Civil Liberties
Co-Director, The Arthur Garfield Hays Civil Liberties Program

Telephone: (212) 998-6285
Fax: (212) 995-4760
Email: helen.hershkoff@nyu.edu

June 5, 2023

Dear Judge:

I am happy to recommend Berke Gursoy for a judicial clerkship with you following his graduation from New York University School of Law in May 2024. I know Berke as a student and as a Research Assistant, and am confident he can handle the rigor and challenges of a fast-paced chambers.

Berke was a student his first year at NYU in my required course in Procedure. I taught the course remotely, and getting to know the students as individuals presented many challenges for me. However, Berke often came to "Zoom" office hours and asked insightful, thoughtful questions, and I formed a highly favorable opinion of him. I also have permission to share that I talked at length with Berke when he experienced a complicated medical condition that could easily have derailed his 1L year. Berke somehow remained focused, determined, and calm, and performed exceptionally well on my examination. (Berke tells me that the condition is now under control and fortunately behind him.)

I was very pleased to work with Berke as a Research Assistant—first, during his 1L summer when he worked with me and my co-author Dean Troy McKenzie in helping to update our annual Federal Rules Supplement to accompany our procedure casebook; and second, during his 2L year, when he again worked with me and the Dean in helping to prepare our annual "Update Memo" for faculty users of our casebook. The Update Memo basically surveys case developments in Civil Procedure over the prior year. We include all major Supreme Court and Court of Appeals decisions pertaining to the 1L course, and also provide a sampling of district court decisions that can be used as teaching hypotheticals, possible examination questions, and indications of trends and open questions. Selecting these lower court cases requires not only excellent research skills but also judgment, and Berke demonstrated both. The skills and enthusiasm that he showed as a Research Assistant would surely carry over to his work as a judicial clerk.

In addition to his considerable work with me and the Dean, during 2L year Berke also served as a staff editor of the NYU Journal of Legislation and Public Policy (I am the faculty supervisor), and was selected to be the Senior Notes Editor. JLPP is a relatively new journal at NYU—it was founded by Professor Norman Dorsen and it maintains the very high intellectual standards that Norman modeled and demanded. Berke is an integral member of the team.

Before coming to NYU, Berke worked as a paralegal with the Criminal Fraud Section of the U.S. Department of Justice, and as a 2L student he undertook a very time-intensive internship with the DOJ Antitrust Division and an externship with the U.S. Attorney's Office for the Southern District of New York. As these activities suggest, Berke looks forward to government service and is highly adept working in complex, regulated fields that draw on procedure and administrative law.

I asked Berke to describe himself in a few adjectives and his word choices are spot-on—resilient, determined, curious, and ambitious. He takes on a great deal of responsibility and works hard to achieve excellent results (at Cornell he completed a triple major); he is analytically sharp; and he is truly interested in the law and enjoys legal discussion. For all of these reasons I believe he would be an excellent judicial clerk and a welcome member of chambers. I recommend him with warm enthusiasm.

Thank you for your consideration.

Yours truly,

Helen Hershkoff

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Richard R. W. Brooks
Emilie M. Bullowa Professor of Law

I am delighted to have this opportunity to write to you regarding Berke Gursoy. I have had extensive interactions with Berke, both in class and outside of the classroom context. These occasions have allowed me to develop a good sense of his personal and professional character. I am convinced that Berke is intelligent and motivated, and his work ethic makes him an outstanding candidate for a judicial clerkship. I would like to share with you my somewhat uncommon experience with Berke that has led me to this firm judgment.

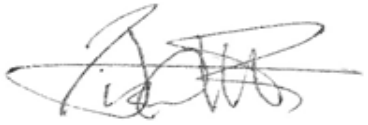
Most students approach faculty to solicit letters of recommendation. In this case, I approached Berke to ask him if he planned to apply for clerkships, which I encouraged him to do, and *I offered* to write a strong letter on his behalf. Why? Here's the background. I first met Berke in the fall of 2021 in my first-year contracts course. Berke immediately impressed me as being among the more thoughtful and well-prepared students in the course. During lectures, he was always engaged and frequently asked questions indicating careful preparation and insight. Based on his classroom performance and our individual meetings during office hours, I would have predicted that Berke would receive one of the top grades in the class. It is not uncommon, of course, for such predictions to fall short of expectations. The first law school exam that students take can be a poor diagnostic of their learning and capabilities. I was, however, more than a little surprised by Berke's exam score. To be sure, it was a difficult examination, and his raw score did not differ so significantly from those who benefited more from the mandatory grading curve. His score was just below the mean, but I had expected it to be well above the mean, like his classroom performance.

It was a puzzle for me, but it was soon resolved when I learned that Berke was hospitalized on multiple occasions in the school year and during the reading period before my final examination. (Berke has consented to me sharing this health information, and I would note without going into further detail that the matter was episodic and no longer an issue.) After learning this information, Berke and I met on multiple occasions in the spring term of this first year, initially to discuss his exam and test-taking approaches, but eventually, our focus turned to his broader academic interests and career choices. These conversations reaffirmed my opinion and assessment of his potential. Berke is a brilliant young man. He has a strong conceptual mind—quick on his feet yet substantive. Moreover, he is resilient and determined. It is this determination, combined with his intelligence, that persuades me of Berke's ultimate ability and likelihood of being an outstanding judicial clerk.

I am confident that, given a chance, Berke will impress you as much as he has me. You will quickly notice that he is a self-starter with a very pleasant and personable manner. His personality and work ethic are well-suited for the intimate and demanding environment of the judicial chambers. I give him my strongest recommendation, and I encourage you to contact me if I may provide you with any more information in support of his consideration.

Sincerely,

Richard R.W. Brooks



A Higher Standard for Pen/Trap Devices: From Relevancy to Specific and Articulable Facts

In this memo, I argue that, considering the sheer breadth of information that a pen/trap device can reveal and the extent of the privacy violation that this represents, the current legal standard for acquiring such a device and the level of judicial oversight of their use are inadequate. I am not advocating for *Smith v. Maryland* or its progeny to be overturned. In addition, I am not calling for an end to the third-party doctrine.[1] Indeed, four decades of case law have clarified that, in the eyes of the judiciary, the information revealed by pen/trap devices is not content and is thus not subject to Fourth Amendment protections. Changing that would radically alter the bounds of criminal investigations. This would make it significantly more difficult for law enforcement to establish the probable cause necessary for more invasive investigative techniques (e.g., search warrants). Instead, I push for a compromise, suggesting that the legal threshold for pen/trap devices should increase from the low bar of relevancy to a higher specific and articulable facts (SAF) standard, akin to the one required for orders under 18 U.S.C. § 2703(d)[2]. Furthermore, implementing a SAF standard for pen/trap devices would prompt an increased level of judicial oversight in their use because this would allow for actual judicial review —a marked improvement over the current judicial rubber stamp. Overall, this reform would increase privacy protections while not substantially burdening law enforcement. It would thus represent a substantial improvement to the current permissive regime.

Definitions

Pen/trap refers to two separate tools of surveillance: a pen register and a trap and trace device. They are deployed together, governed by the same law, and administered through the same

[1] *See generally* Smith v. Maryland, 442 U.S. 735 (1979) (holding that the installation of pen register does not constitute a "search" under the Fourth Amendment and defining the "third-party doctrine" which states an individual does not have a reasonable expectation of privacy in information voluntarily shared with a third-party).
[2] 18 U.S.C. § 2703(d).

device/program.[3] In brief, pen registers record outgoing addressing information, while trap and trace devices record incoming addressing information.[4] The following sections expand on this definition.

The Extent of Applicability of a Pen/Trap Device

Traditionally pen/trap devices were somewhat limited in the extent of their applicability. When the Pen/Trap Statute, 18 U.S.C. §§ 3121–27, was enacted in 1986, the pen register and the trap and trace device were defined narrowly.[5] They were described as devices that were installed on telephones or attached to telephone lines. In this capacity, a pen register would track the telephone numbers dialed out from the surveilled phone, and the trap and trace device could list telephone numbers that were dialed in. However, Congress revised this definition in 2001 as part of the US Patriot Act.[6] Specifically, the act broadened "the communications media" on which a pen/trap device could be installed.[7]

Today, a pen register is defined as "a device or process that records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted."[8] A trap and trace device is "a device or process which captures the incoming electronic or other impulses which identify the originating number or other dialing, routing, addressing, and signaling information reasonably likely to identify the source of a wire or electronic communication."[9] These definitions are broad, and their breadth is a function

[3] *See* Deborah F. Buckman, Annotation, *Allowable Use of Federal Pen Register and Trap and Trace Device to Trace Cell Phones and Internet Use,* 15 A.L.R. Fed. 2d 537 §2 (2022) (describing the use of pen registers and trap and trace devices and their shared statutory basis).
[4] *See* H. Marshall Jarrett & Michael W. Bailie, *United States Department of Justice, Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations* 154 (2009), https://www.justice.gov/file/442111/download (stating the nature of pen registers and track and trace devices).
[5] *See* Buckman, *supra* note 3, at 538 (articulating the history of the pen/trap statutes); Pen Registers and Trap and Trace Devices, 18 U.S.C. §§ 3121–3127.
[6] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2011(USA PATRIOT Act), Pub. L. No. 107-56, §214, 115 Stat. 272 [hereinafter Patriot Act].
[7] See Buckman, *supra* note 3, at 542 (describing the effects of the Patriot Act upon the pen/trap statutes).
[8] 18 U.S.C. § 3127(3).
[9] 18 U.S.C. § 3127(4).

of "the scope of their components." To illustrate, first, "an instrument or facility from which a wire or electronic communication is transmitted" encompasses a wide variety of communications technologies, including a "non-mobile telephone, a cellular telephone, an Internet user account, an email account, or an IP address." Second, "the definitions' inclusion of all 'dialing, routing, addressing, [and/or] signaling information' encompasses almost all non-content information in a communication."[10]

In sum, under the bounds of 18 U.S.C. § 3127, the government can install a pen/trap device and conduct continuous surveillance of an individual's phone, cell phone, email account, WhatsApp account, IP address, and so on to obtain non-content information.[11] But what is non-content information, and what is content? The distinction is critical, as a pen register is statutorily forbidden from collecting content information.[12] Under 18 U.S.C. § 2510(8), content includes "any information concerning the substance, purport, or meaning of that communication."[13] However, the difference between the two is best presented through analogy. For example, in the context of mail, the content would be the letter itself stored in the envelope. Non-content is everything else, including the "mailing and return addresses, the stamp and postmark, and the size and weight of the envelope when sealed."[14]

Applying this metaphor forward, a phone pen/trap device does not record a conversation. However, it monitors the number dialed, the length of each call, and when each call was made. An email pen/trap does not record what was said in an email, but the government has access to the name of whom was emailed and at what time the message was sent (though not the subject line, as this is

[10] Jarrett & Bailie, *supra* note 4, at 153.
[11] *See* DAVID S. KRIS & J. DOUGLAS WILSON, NATIONAL SECURITY INVESTIGATIONS AND PROSECUTIONS § 18:2 (3rd ed. 2019) [hereinafter NSIP] (describing the scope of uses for pen/trap devices in the aftermath of the Patriot Act).
[12] *See* 18 U.S.C. §§ 3127(3), 3127(4) (articulating that pen/trap devices do not collect any "content information).
[13] 18 U.S.C. § 2510(8).
[14] Daniel J. Solove, *Reconstructing Electronic Surveillance Law*, 72 Geo. Wash. L. Rev. 1701, 1726 (2004).

considered content).[15] An IP address pen/trap does not record the specific URLs a person accessed, but it does record connections between a person's private IP address and the IP addresses of the websites accessed.[16] Therefore, despite the restriction on surveilling content, the amount of information the government can collect through pen/trap is staggering. In a sense, pen/trap surveillance provides a glimpse into an individual's mind, offering an "intimate window" into their "familial, political, professional, religious, and sexual associations."[17] For a phone pen/trap, if the government is surveilling an individual, it can determine if they are calling "a bank, a political headquarters, a church, or a romantic partner."[18] As Justice Stewart observed in his dissent in *Smith*, "[these numbers] easily could reveal the identities of the persons and the places called, and thus reveal the most intimate details of a person's life."[19]

Furthermore, beyond revealing the number dialed, the information provided by a pen/trap is significant. For example, "a lengthy call will suggest that 'the two people on opposite ends of the line knew each other, or at least had something substantial to discuss.'"[20] An IP address pen/trap represents, perhaps, an even greater intrusion. This is because, in tracing how a person uses the internet, the government can "learn the names of stores at which a person shops, the political organizations a person finds interesting, a person's sexual fetishes and fantasies, their health concerns, and so on."[21] Indeed, in *United States v. Soybel,* an IP pen/trap captured the Defendant's

[15] *See* Jarrett & Bailie, *supra* note 4, at 152 (describing the nature of what is captured by a pen/trap device).
[16] *See* Deborah Buckner, *Internet Search and Seizure in United States v. Forrester: New Problems in the New Age of Pen Registers*, 22 BYU J. PUB. L. 499, 514 (2008) (discussing what precisely is captured by an internet pen/trap); *see also* U.S. v. Forrester, 512 F.3d 500, 504 (9th Cir. 2008) (clarifying that if a person visits the New York Times website, the pen/trap does not reveal the specific articles they read but does record that the person New York Times website at http://www.nytimes.com).
[17] United States v. Soybel, 13 F.4th 584, 594 (7th Cir. 2021).
[18] *Id.*
[19] *Smith*, 442 U.S. at 748 (Stewart, J., dissenting).
[20] Orin S. Kerr, *Internet Surveillance Law After the USA Patriot Act: The Big Brother That Isn't*, 97 NW. U. L. REV. 607, 643 (2003).
[21] Solove, *supra* note 14, at 1701, 1728.